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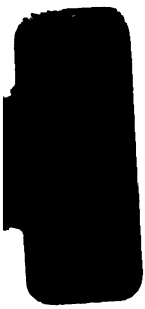

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CASES

UPON

APPEAL FROM DECISIONS OF REVISING BARRISTERS,

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas Term,

XXIV. VICTORIA. 1860.

County of LANCASTER.—Southern Division.

WILLIAM BRUMFITT, Appellant; HENRY BREMNER, Respondent. *Nov.* 20.

In revising the list of voters for a county, the barrister by inadvertence drew his pen through the name of A. B., which he did not intend to strike out. Discovering his error, he partially effaced the obliterating mark, and did not place his initials against the line in the margin, which by the 41st section of the 6 & 7 Vict. c. 18, he should have done if he had intended an alteration. In printing the lists to form the register for the ensuing year, the clerk of the peace, assuming that A. B.'s name had been expunged by the revising barrister, omitted it, and a few copies of the printed book were sold before the error was discovered. Having his attention called to the blunder, the clerk of the peace corrected it by causing a fresh leaf to be printed, inserting A. B.'s name in the proper place with the consecutive number prefixed to it, with the addition of the letter A.,—thus, "5638 A.," and sent copies of the newly printed leaf to the purchasers of the before-mentioned so-called copies, requesting them to substitute it for the corresponding leaf in the book so sold to them. *The clerk of the peace afterwards signed and delivered to the sheriff the book as corrected:—*

Held, that the book so signed and delivered to the sheriff was "the register" for the year, and consequently that a notice of objection signed by A. B. was a good notice.

Held, also, that a strict compliance by the clerk of the peace with the direction in s. 47 to sign and deliver the book to the sheriff "on or before the last day of November," was not a condition precedent to the validity of the register.

AT a court held for the revision of the lists of voters for the southern division of the county of Lancaster, William Brumfitt objected to the name of William *Birchall being retained in the Ashton-in-Makerfield list of voters for the southern division of the county of Lancaster. [*2

The notice of objection was as follows:—

"Notice of objection.

"To Mr. William Birchall, Edge Green Lane, Ashton-in-Makerfield.

"Take notice that I object to your name being retained in the Ashton-in-Makerfield list of voters for the southern division of the county of Lancaster.

"Dated this 18th day of August, in the year 1860.

"William Brumfitt,

"of No. 108, Netherfield Road North, in the township of Everton, (late of No. 21, Devonshire Place, in the township of Everton,)—on the register of voters for the parish of Liverpool."

On turning to the bound copy of the current register of voters, which was produced from the custody of the sheriff, it appeared that the sheet numbered 313 had been pasted into the book after it had been bound; and upon this sheet the name of William Brumfitt was inserted as follows:—

5638 A.	Brumfitt, William.	21, Devonshire Place, Everton.	Freehold houses.	Peers Court, Circus Street. Mr. Roberts and others tenants.

The number prefixed to the name preceding "Brumfitt" was 5638, and to the one succeeding, 5639.

A copy of the sheet numbered 313, showing the interlineation, and signed by the revising barrister, was annexed to the case.

It was proved, that, on the 12th of December, 1859, Mr. John Robinson Burne, of Manchester, applied by letter to the deputy clerks of
*3] the peace for the county *of Lancaster for two copies of the register of voters for South Lancashire, and that they replied as follows:—

"Preston, 13th December, 1859.

"Sir,—We have received your favour of yesterday's date enclosing a post office order for 1*l.* for two copies of the register of voters for South Lancashire. The copies shall be sent as soon as they are ready.

(Signed) "Birchall & Wilson."

"J. R. Burne, Manchester."

About the 29th of December, 1859, the deputy clerks of the peace sent Mr. Burne two copies of the register, which had their names *printed* in the last sheets thereof respectively, thus,—"Birchall & Wilson, deputy clerks of the peace."

Neither of these copies contained the name of William Brumfitt, the objector, on the 313th sheet. Similar copies of the register were also sold to other people, and, amongst the rest, to the said William Brumfitt himself.

On the 13th of January, 1860, the deputy clerks of the peace wrote to Mr. Burne, as follows:—

"Preston, 13th January, 1860.

"Sir,—You will perceive by the enclosed sheets of register that there has been an error in the printing, the name of William Brumfitt having

been omitted. We shall, therefore, be obliged by your returning us the sheets paged 313 in the copies we sent you on the 29th ultimo, and substituting the enclosed for them.

(Signed) "BIRCHALL & WILSON."

"Mr. J. R. BURNE, Manchester."

The attention of the deputy clerks of the peace was first called by the objector himself to the omission of his name from the register of voters so sold, and after the sale thereof. In consequence of his application to *have his name inserted, they looked at the revise of last year's register, and found that the name was not initialed by the revising barrister as intended to be erased, but that the revising barrister, having evidently run his pen through the name by mistake, had immediately passed his thumb over the wet ink and so occasioned an appearance of erasure which had misled them. The register, although bound and ready for signature and delivery, had not at the time of this application by the objector been signed by the deputy clerks of the peace and delivered to the sheriff, as required by the statute,—the length of the register, and difficulties which had arisen in the printing, having prevented their doing so before the 30th of November, the time fixed by statute. They therefore determined that the name of the said William Brumfitt should be interlined in print, as it now appears, on the 313th page; and the sheet with such interlineation was substituted for the original sheet in the whole of the registers in the bound copy of the register which was by them signed and delivered to the under-sheriff after such substitution. [*4

It was contended that the sale by the deputy clerks of the peace of copies of the register bearing their printed signature, although printed in previous to their sign manual, was an adoption by them of such signature; and that they had no power afterwards to make any alteration in the register, which was from that moment perfectly formed; and that, inasmuch as such copies when sold did not contain the name of William Brumfitt, his name was not now legally upon the register of voters for the southern division of the county of Lancaster.

It was argued by William Brumfitt that the revising barrister had no jurisdiction in the matter, but must receive the official register as delivered to him by the *deputy clerks of the peace, they being the persons appointed by the statute of Victoria to deliver the register then in force to the revising barrister: but that, if not the register legally in force for the time being, then the register for the previous year, in which the name of the said William Brumfitt duly appeared, must be held to be still in force. [*5

The revising barrister held that such sale by the clerks of the peace of the register to Mr. Burne and others must be taken as the publication of the register, and as an adoption by them of the signature printed at the ends thereof respectively; and that they had no power afterwards to insert any name or make any alteration in the register. He therefore decided that the name of the objector was not legally upon the register of voters for South Lancashire, and declined to receive the notice of objection given by him against the vote of William Birchall, whose name was consequently retained upon the list of voters for the township of Ashton-in-Makerfield.

If such decision was right, the list of voters was to remain as amended

by the revising barrister; and, if wrong, the names of the said William Birchall and of several other persons (*a*) to whom the same objection applied, and whose cases were consolidated with this case, were to be removed from the list of voters.

Welsby (with whom was *Aspinall*), for the appellant.—The conclusion arrived at by the revising barrister was wrong. The question depends upon the construction *of a few sections of the 6 & 7 Vict. c. 18. *6] The 34th section defines the duties of the clerk of the peace and of the overseers in respect of the production of the lists of voters. It enacts that "the clerk of the peace of every county, at the opening of the first court to be holden in and for the same county, shall deliver or cause to be delivered to the barrister all the lists of voters for the then current year, with the marginal additions as aforesaid (s. 5), and lists of persons objected to in the said year, relating to the said county, and also one or more printed copies of the register of voters then in force for the said county; and the overseers of every parish and township shall attend the court to be holden for revising the lists relating to their parish or township, and shall deliver to the barrister holding such court the original notices of claim, and notices of objection given to them as aforesaid." The 37th section enacts, "that, if any person who shall have given to the overseers of any parish or township due notice of his claim to have his name inserted in the list of persons entitled to vote in the election of a knight or knights of the shire, shall have been omitted by such overseers from such list, it shall be lawful for the revising barrister, upon the revision of such list, to insert therein the name of the person so omitted, in case it shall be proved to the satisfaction of such barrister that such person gave due notice of such his claim to the overseers, and that he was entitled on the last day of July then next preceding to be inserted in the said list of voters." The 41st section enacts, that "every such barrister shall upon the hearing in open court finally determine upon the validity of such claims and objections, &c.; and such barrister shall in open court write his initials against the names respectively expunged or inserted, and against any part of the said lists in which any mistake shall have been *corrected or any omission sup- *7] plied or any insertion made by him, and shall sign his name to every page of the several lists so settled." The material section is the 47th, which enacts "that the said lists of voters for each county, signed as aforesaid (s. 41), shall be forthwith transmitted by the revising barrister to the clerk of the peace of the same county, and the clerk of the peace shall keep the said lists among the records of the sessions, and shall forthwith cause the said lists to be copied and printed in a book or books, arranged with the names in each parish or township in strict alphabetical order, according to the surnames, and with every polling district in alphabetical order, and with every parish or township within such polling district likewise in the same order, and shall, after the last list for each polling district, insert a list in like alphabetical order of all persons whose names shall not appear in any of the said lists for such polling district, but who shall in manner hereinbefore mentioned have

(*a*) The persons thus objected to were about 1500 in number. In consideration of the great expense which would be entailed on the parties by requiring a schedule of the names, &c., of all these persons to be appended to each copy of the appeal case, by leave of the court such schedule was annexed only to the copy filed with the master.

been registered by the revising barrister to vote at the polling place of such last-mentioned district, and shall in the said book prefix to every name its proper number, beginning the numbers from the first name, and continuing them in regular series down to the last name: Provided always that a number as aforesaid shall be prefixed to the name of every person in every such list inserted after the last list for any polling district as aforesaid; and no number, but an asterisk only, shall be prefixed to the name of the same person in the list of the parish or township in which his name originally appeared; and every such book shall be printed and arranged in such manner and form that the list of voters of and for each and every separate parish or township contained therein may be conveniently and completely cut out or detached from all the other lists of voters contained in *the same book, so that all the [*8
lists for every or any polling place, or the list of every or any single parish or township, may be ready for the purposes of this act or for sale; and the said clerk of the peace shall sign and deliver the said book or books on or before the last day of November in the then current year to the sheriff of the county, to be by him and his successors in the office of sheriff safely kept, for the purposes hereinafter and in the said recited act mentioned." The directions contained in that section were in all respects complied with on this occasion, except that the book was not completed and delivered until after the 13th of January, 1860. The 49th section provides "that the said printed book or books so signed as aforesaid by the clerk of the peace, and given into the custody of the sheriff of any county, shall be the register of persons entitled to vote at any election of a member or members to serve in parliament which shall take place in and for the same county between the last day of November in the year wherein such register shall have been made and the first day of December in the succeeding year: and the clerk of the peace of every county shall keep printed copies of the said register for such county, and shall deliver such copies of such register, or of any part thereof, to any person applying for the same, upon payment of a price after the rate contained in the table numbered 2 in the schedule D. to this act annexed," &c. That section is to be read in conjunction with the 27th, which enacts, "that, in case no list of voters shall have been made out for any parish, township, or place in any year, or in case such list shall not have been affixed in any place hereinbefore mentioned in that behalf, the register of voters for that parish, township, or place then in force shall be taken to be the list of voters for that parish, township, or place, for the year then next *ensuing; and the provisions herein con- [*9
tained respecting any such list of voters shall be taken to apply to such register as aforesaid." According to these provisions, the register is to be signed and delivered to the sheriff on or before the 30th of November. That is directory only,—to be complied with where practicable; and not compulsory, like the days appointed for giving notices of claims (s. 15) or notices of objections (s. 17). Here the objector's name was inserted in the book before it was signed by the clerk of the peace. The printer had by mistake omitted it: but, attention having been called to the blunder before the signature of the clerk of the peace, and before the delivery of the book to the sheriff, it was corrected. The objector had a right to be upon the register; and the revising barrister could only take notice of the book as delivered to the sheriff. Unless,

therefore, the objector is by the error of the clerk of the peace or of the printer to be deprived both of his right to object and his right to vote, this objection is good.

Monk, Q. C. (with whom was *Power*, Q. C.), for the respondent.—Since the passing of the Reform Act (2 W. 4, c. 45), there has been no more important question raised than the present. Relying upon the terms of the statute and upon the accuracy of the register furnished to them by the clerk of the peace, the respondents did not think it necessary to appear before the revising barrister to sustain their qualifications. Finding that Brumfitt, the objector, was not upon the register, they disregarded his notice, as they had a right to do. The legislature has most cautiously avoided giving the clerk of the peace the least discretion; and most wisely has this been done, seeing that they or their deputies frequently act as electioneering agents, and the permitting what
*10] was here done would *be giving him an opportunity, if so disposed, of tampering with the register. By the 34th section of the statute the clerk of the peace is required to deliver to the revising barrister all the lists of voters for the current year; and is bound to answer upon oath all such questions as the revising barrister may put to him,—a test to which he was not subjected under the Reform Act. All the provisions of the 47th section seem carefully framed with a view to preventing any tampering with the register by any one after it has been signed and delivered. Even this court, to whom large powers have been intrusted by the legislature, disclaimed a right to interfere with or alter the register even in a case where it was shown that a voter's name had been expunged from a list by mistake: In re Allen, 6 C. B., N. S. 334 (E. C. L. R. vol. 95). The copy of the register issued on the 13th of December was clearly unimpeachable: it purported to be the register for the current year, and it bore the signature of the deputy clerks of the peace,—a printed signature being enough, and their sign manual not being essential to its validity. Supposing the matter stood upon the 47th section, the delivery to the sheriff,—which in practice is never done unless an election is about to take place,—is not essential to the completing of the register. If that be so, the unauthorized insertion of the name of Brumfitt must be rejected as idle and impertinent. To hold that the duty imposed upon the clerk of the peace by the 47th section is directory only, might conduce to enormous mischief. The onus lies on the objector to show his right to object: and this, it is submitted, the appellant has not done here.

Welsby, in reply.—If the signature and delivery of the book by the clerk of the peace to the sheriff on or before the 30th of November be
*11] essential to the *validity of the register, a neglect to deliver it for a single day beyond that time would be fatal. Here, all that was done is found to have been done bonâ fide: and, the matter having been set right on the 13th of January, there was ample opportunity for seeing that Brumfitt's name appeared on the register when the parties came to the court of revision. The question is, when is the register complete? Is it complete when the copy is made out for the printer? or when the first proof is taken? or when it has been revised and corrected? or when the clerk of the peace has taken upon himself to issue it? It is submitted that the printed document does not become the register which the statute contemplates until the clerk of the peace has, in obedience

to the requisitions of the 49th section of the statute, signed and given it into the custody of the sheriff of the county. The argument on the other side assumes that the clerk of the peace has a right to omit from the register the name of a person whom the revising barrister has adjudged entitled to be upon the register. This would be an unwarrantable interference with the functions of the revising barrister: Davies *v.* Hopkins, 3 C. B., N. S. 376 (E. C. L. R. vol. 91). The provisions as to time in the 49th section are as much directory as any part of it. The revising barrister was bound to accept the document presented to him as the register for the county, and had no right to inquire whether the copies sold were really copies or not.

ERLE, C. J.—I am of opinion that the decision of the revising barrister in this case was wrong, and that the signed lists delivered to the sheriff became the register of voters for the county. The object of the statute 6 & 7 Vict. c. 18 was, to ascertain and define with certainty who shall be entitled to vote in the election of members, and to preclude the necessity for inquiry at *the time when the franchise is to be exercised. The act contains a series of provisions, some of which [*12 are directory only and some essential. It is well known that many requirements of the legislature are to be treated as directory only, the omission to observe them not being fatal, whilst others are essential, and must be strictly obeyed. I think the intention of the legislature in this act was, to define the duties to be performed by the overseers, the revising barrister, and the clerk of the peace, before the document becomes the register for the county, city, or borough. There was to be, so to speak, an internal finish to this series of acts by the signature of the clerk of the peace to the lists, and an external finish by his delivering out the document as the register so completed and signed by him to the public officer, to be relied on by him at the time of election as a register of all persons entitled to vote thereat. The two acts of signature by the clerk of the peace and delivery to the sheriff were essential to make the lists become the register for the county. Until these acts were done, there was no complete register; and it was in the power of the clerk of the peace,—nay, it was his bounden duty,—to make the lists correct according to the intention of the revising barrister. It seems that the revising barrister, in going through the list, by mistake passed his pen through the name of William Brumfitt, and, seeing his error, immediately rubbed over the wet ink with his thumb; and, when the lists passed through the printer's hands, this was taken to have been an intentional erasure of Brumfitt's name. He, however, had a right to have his name upon the register; and till the series of acts I have alluded to had arrived at their complete finish, it was manifestly the duty of the clerk of the peace to correct the mistake. One of the acts which by the 47th section of the statute the clerk of the peace is to *do, is, [*13 to cause the lists to be printed in alphabetical order according to the surnames, &c., and to prefix to every name its proper number, beginning the numbers from the first name, and continuing them in a regular series down to the last name. It seems to me that the clerk of the peace did his duty in treating that as directory only, and that he properly complied with the directions of the statute by prefixing the number 5638 A. to the name of William Brumfitt, and so marking it as inserted in that place in the list. I take that to be one of the require-

ments of the act which the legislature has made directory only. I am also of opinion as to the delivery of the copy to the sheriff on or before the 30th of November, that that is directory, and that a failure to comply with it does not avoid the register. If a delivery to the sheriff on or before that day were essential, then, as was well put by Mr. *Welsby*, a delivery a day too late would destroy it altogether. I also think there is much in Mr. *Welsby's* argument, that, if the register is a register before it has been signed animo signandi, and delivered out with the intention of delivering it out as a complete register, at what time can it be said to have become a complete register? At the time the manuscript gets into the printer's hands? or when the first proof is pulled? or when the revise has received its last correction? It seems to me that the case is in no respect altered by the fact of the clerk of the peace having sold the copies before the register was completed. The copies so sold were not correct copies; and notice was given to the purchasers as soon as the mistake was discovered. Upon the whole, I think the revising barrister was wrong in holding that the corrected copy afterwards signed by the clerk of the peace and delivered to the sheriff was not the register. We have been much pressed with the consequences
*14] which will *result from our so deciding. But, however serious those consequences may be, we are bound to administer the law. Our regret for the painful result which has been pointed out by Mr. *Monk* cannot be allowed to affect our judgment. The rule of law being as I have expressed it, I am of opinion that our judgment must be for the appellant.

BYLES, J.—I am of the same opinion. It seems to me that much light is thrown upon this matter by the 41st section, which provides for what the revising barrister shall do, and which is particularly deserving of notice, because it is quite clear what is meant by the word "signed" in that section, which is adopted by words of reference into the 47th section. Now, the 41st section enacts, amongst other things, that such "barrister shall in open court write his initials against the names respectively expunged or inserted, and against any part of the said lists in which any mistake shall have been corrected, or any omission supplied, or any insertion made by him, and shall *sign his name* to every page of the several lists so settled." He is to sign his name in open court; and this is to be done after he has placed his initials against the names expunged or inserted, &c. It is clear, therefore, that the signature here referred to means a signature in its popular sense, viz., a writing of his name. Here, by mistake, the revising barrister had commenced obliterating the name of William Brumfitt from the list before him; but he immediately endeavoured to wipe out the mark of obliteration, and he did not place his initials against the name. When the clerk of the peace came to perform the duties cast upon him by the 47th section, the name of William Brumfitt was erroneously assumed to have been expunged
*15] from the list by the revising barrister, and thus his name was *omitted from certain printed documents,—I will not call them copies of the lists or register, inasmuch as they were not in fact copies, —which were on the 29th of December transmitted by post by the clerk of the peace to Mr. Burne and others. The mistake being afterwards discovered, the clerk of the peace does what by law he was bound to do, viz., he causes the blunder to be corrected in the way described in the

case, and writes his name at the bottom of the register so corrected, and delivers it to the sheriff. That done, a copy of the corrected document was forwarded to each of the persons to whom the clerk of the peace had before sent the incorrect and unfinished document. The question is, which was the register? Now, the 49th section enacts "that the said printed book or books so signed as aforesaid by the clerk of the peace, and given into the custody of the sheriff, shall be the register of persons entitled to vote at any election of a member or members to serve in parliament which shall take place in and for the county between the last day of November in the year wherein such register shall have been made, and the first day of December in the succeeding year." No doubt, the signature and delivery to the sheriff ought to take place on or before the 30th of November. Here, it was not done until after that day,—though how long after, and before the 13th of January, the case does not show. Now, the first question is, what is meant by the words "so signed as aforesaid?" The word "sign" occurs for the first time in s. 41, with regard to the signature of the lists by the revising barrister, which is referred to by the words "signed as aforesaid" at the beginning of s. 47. The word occurs again at the end of s. 47, where it is provided that the clerk of the peace shall "sign" and deliver the book to the sheriff. Again it occurs at the beginning of s. 49, where it is enacted that the book *"so signed as aforesaid" and delivered by [*16
the clerk of the peace to the sheriff, shall be the register of persons
entitled to vote. Comparing all these, it seems to me that the word "sign" in the 47th section, as in the 41st section, means a signature in the ordinary sense, by the hand of the party. That view is fortified by the circumstance of the word "sign" being placed in contradistinction to the word "print," both in the 47th and the 49th sections. It seems to me,—though that is not necessary for the decision of this question,—that the legislature intended that the clerk of the peace should do some act which should especially call his attention to the document he was about to put forth as authenticated by his signature. Be that, however, as it may, I am clearly of opinion that the document is no register until it has received the signature of the clerk of the peace, and has been delivered by him to the sheriff. That document was probably delivered about the 10th or 11th of January; and became the register for the current year. Those things which were given out by the clerk of the peace before, and which purported to be copies of the register, were not in fact copies. As to what has been said about these requirements of the 47th section being directory only, it occurs to me that that is scarcely a proper expression. The duties prescribed by that section are so imperative and obligatory that a wilful omission to comply with them would probably subject the party to an indictment. It is one thing to say that a duty imposed by a statute is imperative and obligatory so as to subject the party neglecting its performance to the penalty of an indictment; but it is quite another thing to say the strict compliance with all the directions contained in the statute is a condition precedent to the validity of the document to which the enactment points. I should only be repeating what has already *been better said, if I were to dilate [*17
upon the consequences which would result from holding the strict
observance of all those minute directions to be essential. Allowing full weight to Mr. *Monk's* arguments as to the inconvenience of permitting

persons circumstanced like these respondents to be prejudiced and misled by a document which they reasonably conceived they had a right to rely on, I cannot shut my eyes to the inconvenience on the other hand of allowing that to be treated as the true register which is manifestly and confessedly incorrect and incomplete. In the choice of inconveniences, I have no hesitation in saying that I entertain no doubt whatever that the decision of the revising barrister ought to be reversed.

KEATING, J.—I also am clearly of opinion that the revising barrister has come to an erroneous conclusion in this case. It is admitted on all hands, that the name of the objector, William Brumfitt, was contained in the list which was signed by the revising barrister and by him transmitted to the clerk of the peace, pursuant to ss. 41, 47, of the Registration Act; that that list was miscopied by the clerk of the peace; and that one or more proofs of that incorrect copy were sold by him. The mistake,—which consisted in the accidental omission of the name of William Brumfitt,—having been subsequently discovered, the clerk of the peace forthwith caused it to be corrected in the only way in which it could be corrected. I am clearly of opinion, that if, having discovered the mistake, the clerk of the peace had delivered to the sheriff a copy of the document without correction, he would have failed in his duty. So far from having done wrong, therefore, in correcting the blunder into which he had fallen, I think he was bound to correct it. I *18] entirely concur in the observations which have been made by *my Lord and my Brother Byles as to the construction of the 47th and 49th sections of the statute: and I think we should be introducing great confusion and great difficulty if we were to disregard the plain words of the 49th section, and to hold that the printed book signed by the clerk of the peace with the intention of signing in obedience to the direction in the 47th section, and delivered to the sheriff, was not *the register*. Our attention has been very forcibly called to the serious results which might flow from giving the clerk of the peace an opportunity of tampering with the register. Now, in the first place, it is to be observed that the case before us finds that all that was done here was done bonâ fide. Further, it seems to me that the observations of Mr. *Monk* would be equally applicable to the state of things which he maintains ought to have existed here; because, if the sale of a single copy of the printed book before it is delivered to the sheriff is to preclude the clerk of the peace from correcting a palpable and admitted blunder, the same opportunity for tampering with the register would be afforded in at least an equal degree. For these and the reasons already given by the rest of the court, I am clearly satisfied that the revising barrister was in error, and that his decision ought to be reversed.

Decision reversed.

*County of YORK.—West Riding. [*19

CHARLES BULMER, Appellant; JAMES EDWARD NORRIS, Respondent. *Nov.* 26.

The members or shareholders of a joint stock company incorporated under the 19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14, have no such freehold interest, legal or equitable, in lands held by the corporation, as to entitle them to be registered as electors,—their rights being confined to a proportionate share in the profits of the company.

At a court held for the revision of the lists of voters for the west riding of Yorkshire, Thomas Brown claimed to vote in respect of a certain freehold mill and premises situate in the township of Yeadon, in the polling district of Otley, in the west riding of the county of York, in the following form:—

Name.	Abode.	Nature of qualification.	Where situate, &c.
Brown, Thomas.	West Hall, Yeadon.	Share in freehold mill and tenements.	Albert Mill.

The freehold premises in respect of which the said Thomas Brown claimed to vote were the property of a joint stock company incorporated under the provisions of the Joint Stock Companies Acts, 1856 and 1857. The claimant was a shareholder in the said company, and had 40*s.* a year in respect of his shares arising out of the said freehold premises.

On the part of the respondent, it was contended that members of a corporation aggregate, or of any association of persons incorporated, having a perpetual succession and a common seal, with power to hold lands under the provisions of the Joint Stock Companies Acts, 1856, 1857, are necessarily incapacitated from voting at elections, and that the name of the said Thomas Brown ought therefore to be expunged.

The revising barrister, being of that opinion, disallowed the claim.

**H. West*, for the appellant.(*a*)—Two questions are presented for the consideration of the court in this case,—first, whether the [*20 members of a corporation aggregate are entitled to vote in respect of the corporate property,—secondly, if so, do these shareholders take such an equitable interest in the freehold of the company as to confer upon them the right to vote. [Erle, C. J.—The question is whether these trading corporations come within the principle as to corporations aggregate,—whether that principle applies to corporations whose members have some rights personal which the members of ordinary corporations have not.] It must be conceded that these companies are corporations aggregate,—see 19 & 20 Vict. c. 47, ss. 3, 7, 13, 38; 20 & 21 Vict. c. 14, s. 3. "By the common law, all freemen of England had a voice in the election of knights of the parliament within the counties where they dwelt. But now by the statutes of 8 H. 6, c. 7, and 10 H. 6, c. 2, they are restrained to such as have 40*s.* freehold per annum within the county, &c.:" Dalton's Sheriff, c. 92, p. 334. This right was still further restricted by the 7 & 8 W. 3, c. 25, s. 7,

(*a*) The case was argued on the 15th of November, before Erle, C. J., Byles, J., and Keating, J.

and the 18 G. 2, c. 25, and also by the 2 W. 4, c. 45. It cannot be denied that the proposition has been generally assumed to be as it is laid down here by the revising barrister. That proposition is founded upon the resolutions of the committee of the House of Commons in the Cambridge Case, 1 Journ. 798, May 28, 1624, which are thus stated in Heywood's County Elections 115,—"Mr. Glanville made the report of the committee. It appeared that the freeholders complained that the scholars and fellows of colleges and halls, and parsons and vicars, *21] came and gave voices at the election; and *the house agreed with the committee in resolving, upon question, 'that members of colleges, halls, or corporations, not having freehold, saving in right of their colleges, halls, or corporations, ought not to have voice in elections of knights or burgesses.' And, upon a second question, 'that fellows and scholars that have fellowships and chambers above 40*s.* ought not to have voice in elections.' And also, upon question, 'that parsons and vicars that have no other freehold but glebe lands, ought not to have voice in elections.'" This last resolution clearly is not law at the present day. So early as the time of the Rump Parliament (1649), rectors and vicars (having glebe) voted, and that right was confirmed in the time of Charles II., and has repeatedly been recognised since.(*a*) The second resolution has, no doubt, been many times acted upon by committees of the House: see 2 Peckwell 113. [Keating, J.—It has invariably been acted upon by committees.] In Rogers on Elections, 7th edit. p. 150, it is said: "Sole corporations vote without objection. It is difficult to understand the principle upon which individuals who are members of corporations aggregate are disabled from voting in right of the interest they possess as members of a corporate body. The disability cannot arise out of the tenure by which they hold, because such also would apply to corporations sole; nor can any valid objection be found in the circumstance that they do not hold their interest in severalty, because such would also exclude joint tenants, tenants in common, and co-parceners." And this view is adopted in Elliott on Registration, 2d edit. p. 17. In Warren's Election Law 70, speaking of the freehold interest which entitles the possessor to vote, it is said: "But this *22] freehold interest may be vested in one *person, or in several as joint tenants or as tenants in common. Both these classes have the right to vote; joint tenants, as seised per my et per tout; tenants in common, because each has a separate interest in his respective share. Co-parceners constitute, however numerous, but one heir, and have but one estate among them: but, in the case of males, subject to sufficiency of value, each may vote; as may also the husband of a female co-parcener: Bedfordshire, 2 Luders. 447. It is otherwise with the members of a *corporation aggregate*, who have been denied the right of voting in respect of the lands of the corporation, on the ground that they are vested in the corporation itself, and not in the individual members. It seems questionable, however, whether this exclusion rests upon sound principle. It is difficult, indeed, to understand on what the disability precisely depends. It cannot arise out of the *tenure* by which the members hold, for that would be equally applicable to corporations sole, whose right to vote is indisputable; nor out of the circumstance of their not holding their interest in *severalty*, for that objection would

(*a*) See Heywood's County Elections 120, 121.

exclude joint tenants, tenants in common, and co-parceners." The reason assigned in Sewell on Registration, p. 28, is, that "generally speaking, in corporations aggregate, the estates seem to form one common property, which it is impossible to assign with certainty to any individual." That reasoning, however, can hardly be sound. The cases of Heath, app., Haynes, resp., 3 C. B. N. S. 389 (E. C. L. R. vol. 91), and West, app., Robson, resp., 3 C. B. N. S. 422, will probably be relied on for the respondent. But these cases have no direct bearing upon the question: in the former, the occupation was held to be insufficient; and the decision in the latter turned on the fact that the claimants had not 40*s.* clear issuing out of lands in Durham,—the points here raised having been *over- [*23
ruled by the revising barrister. Simpson, app., Wilkinson, resp., 8 Scott N. R. 814, 7 M. & G. 50 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 168, is in favour of the appellant. Burleigh Hospital is a freehold building, divided into rooms, each of which is of the annual value of 4*l.*, and is separately inhabited by a bedesman appointed under certain rules. Each bedesman keeps the key of his own room, and the successor of each deceased bedesman occupies the same room as did his predecessor. No charter, deed, or other document relating to the foundation could be discovered. The ordinances referred to certain feoffees and their heirs, but none were known. By these rules, which bore date the 20th of August, 1597, it was amongst other things provided that none was to be admitted who was leprous, a drunkard, adulterer, &c., and that any one so afflicted, or guilty of any of the offences specified, should be displaced; but there was no instance on record of a bedesman having ever been displaced. The bedesmen having claimed to be entitled to vote for the county in respect of their several interests, the barrister decided that a legal foundation might be presumed, not necessarily investing the claimants with a corporate character, and that they were respectively entitled to a separate freehold estate in their rooms respectively: it was held that his conclusion was right in point of law, and warranted by the facts. [Byles, J.—There is no common seal there.] That is the only distinction between that case and the present. So, in Baxter, app., Newman, resp., 8 Scott N. R. 1019 (7 M. & G. 198 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 287, nom. Baxter, app., Brown, resp.), the partnership was in all respects like this, except for the seal. There, A., B., C., and D. joined in partnership to work a fulling-mill. Money was subscribed by all the partners; with one part of which freehold land was bought, which was conveyed to A. and B. in fee; with other part, a *mill was built on the land, and machinery for the mill was pur- [*24
chased. By a partnership deed executed by A., B., C., and D., the trusts of the land, mill, &c., were declared to be (among other things) that A. and B. should stand seised and possessed of all the estates, property, goods, &c., upon trust for the benefit of themselves and their partners, as part of their partnership joint stock in trade: there was a provision in the deed that A. and B. might borrow money upon mortgage of the stock, property, estates, &c., belonging to the copartnership: and it was declared that the land, mill, &c., *should be deemed and considered as or in the nature of personal estate and not real estate*, and be held in trust for the partners as part of their partnership stock in trade. A. and B., under the powers of the deed, borrowed money for the purposes of the partnership, for which they gave bonds and notes in their own names, but did

not mortgage any part of the property. It was held, that each partner had an interest in the realty corresponding with the amount of shares held by him in the partnership, and that the money so borrowed had not the effect of mortgages on the shares of the partners. In delivering the judgment of the court, Tindal, C. J., says: "The ground on which we consider these claimants to have such right,"—that is, a right to vote in respect of an *equitable interest* in the realty,—"is this, that the property of which the trustees are seised in trust for the benefit of the shareholders who form the copartnership, is freehold land; that the copartners by their committee are in possession thereof; that the trusts declared by the deed are no more than agreements and regulations entered into between the copartners for the better carrying on their joint trade by the means of such land and the mill erected thereon, and are not trusts which are inconsistent with an equitable seisin of the free-
*25] hold in the *copartners; and, lastly, that it is found by the revising barrister that the amount of the shares of each of the claimants in the real property of the company is sufficient in value to confer a vote." And, after referring to Crawshay *v.* Maule, 1 Swanst. 521, Bligh *v.* Brent, 2 Y. & C. 268,† and the cases of The Vauxhall Bridge Company, 1 Gl. & Jam. 101, and The Lancaster Canal Company, Mont. & Bligh 112, his Lordship concludes,—"Upon the principle, therefore, that the land and mills built thereon are the basis and subject-matter of the trade out of which the profits arise, which are to be distributed amongst the shareholders; that the trusts relate only to the management and conduct of the land and mills, and the trade carried on by means of the same; that there is no trust declared which is inconsistent with an equitable interest in the freehold in the respective shareholders; that the copartners are, by their committee, in possession; and, lastly, that the value of each man's share is sufficient to enable him to vote,—we think the shareholders had an equitable seisin in a sufficient estate to entitle them to vote for the county." [BYLES, J.—The case of an ordinary partnership differs essentially from that of a joint stock company. In the former, a new partner cannot be introduced without the assent of the members of the firm. Would the parties in Baxter, app., Newman, resp., have lost their right to vote if they had been completely registered under the 7 & 8 Vict. c. 110, which had then just passed, and the words of which are nearly the same as those of the 19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14?] The respondent must contend that they would. Every reason given by the court in Baxter, app., Newman, resp., is equally applicable here: and the court will not further abridge the rights of freeholders, where there are no express words
*26] of an act of parliament to warrant it. [ERLE, C. J.—Has *the exclusion of corporations aggregate ever been recognised by any act of parliament?] No.

Manisty, Q. C., contrà.—To entitle a party to be registered as an elector in respect of a freehold qualification, he must be seised of a legal or an equitable freehold of the yearly value of 40*s*. It is conceded that no distinction can be taken between a corporate body under the statutes referred to and an ordinary corporation aggregate. The general principle, which has never to this moment been doubted, is well stated in Grant on Corporations, p. 5,—"Continuous identity, a name, and a common seal, seem indispensable requisites to the creation of a corporation

proper. The principal distinctions between a corporation and any other body of persons associated together for specific purposes, are, besides the attributes above mentioned, these further important characteristics, namely, that corporators in general are not liable, either civilly or criminally, for any share they may have taken in a regular corporate act within the competence of the corporation to perform: and that corporators, where the corporation is possessed either of personalty or real property, have in general no individual share, right, title, or estate to or in any specific part or portion thereof, which is wholly vested in the ideal entity or abstraction, the corporation, and not in the body of persons who happen to be at any given time the existing corporators, either jointly, severally, or as joint tenants, or tenants in common, or in any other mode or way whatsoever." These persons elect to become a corporate body with all the incidents which the law attaches to the corporate character. The shareholders in such a corporation are only interested in *the profits* in proportion to the value of their shares. They have no equitable seisin, as the partners had in Baxter, *app., Newman, resp. There is no resulting trust. They are a perpetually [*27 fluctuating body. Take the case of a railway company whose line runs through several counties. The land vested in them is held just as this property is held. Could it be said that every shareholder would have a vote for every county in which the company holds land, provided the annual value be sufficient to give each 40*s.* a year therein? And if so, how is the value to be ascertained? If parties choose to become trading corporations, they must be content to take the burthens with the advantages of that character. No good reason can be suggested why a trading corporation should be placed upon any other footing in this respect than any other corporation aggregate. The shares are by the statute 19 & 20 Vict. c. 47, s. 15, declared to be personal estate: and, but for the provision in s. 38, the holding of land by these companies would be within the prohibition of the mortmain acts. In Bligh *v.* Brent, 2 Y. & C. 268,† it was held that real property held for the purposes of a trading company, is, in equity, to be deemed in the nature of personal estate, although the company is a corporation, and the shares are assignable, and one shareholder is not answerable for the acts of another in relation to the partnership concern. In the course of the argument there, it was observed by counsel, that, "in every joint stock company, the shareholder has an estate of the same nature as the company. In all the cases which have been cited that principle was taken for granted, and in the cases of real property, the widow was held dowable." But Lord Abinger, C. B., said: "If a joint stock company purchase property, each individual shareholder has an interest in it; but, the moment the company becomes a corporation, the corporation has the property in trust for the individuals. That proceeds on the *principle that [*28 a man cannot be trustee for himself." And Parke, B., says: "The difficulty arises from confounding the corporation with the persons who take the profits: those persons have no right to anything but the profits." That, it is submitted, is the true principle. The utmost these parties have, is, a right to a share in the profits. Baxter, app., Newman, resp., is in reality a strong authority for the respondent. Maule, J., in the course of the argument, there says,—8 Scott N. R. 1030,—"In the case of a corporation, it is the whole body,—the abstraction of

law,—that is seised. The members are no more seised than the members of a man's body could be said to be seised of his estate." [BYLES, J.—Do you contend, that, if a partnership consisting of more than seven members becomes possessed of land, and afterwards obtains a certificate of complete registration under these acts of parliament, its members lose the right of voting?] The moment they become a corporate body their right of voting is gone.

West, in reply.—The argument derived from the fact of the members of these companies being a fluctuating body, is entitled to little consideration; for, no man is entitled to have his name inserted in the register, except in respect of a property qualification held by him for the statutory period. *Cur. adv. vult.*

KEATING, J., now delivered the judgment of the court:—

In this case Thomas Bulmer claimed to vote for the west riding of the county of York in respect of a qualification described as "share in freehold mill and tenements:" and the revising barrister found that the *29] claimant was a shareholder in a joint stock company *incorporated under the provisions of the Joint Stock Companies Acts, 1856 and 1857, and that he had 40*s.* a year in respect of his shares, arising out of a certain freehold mill and premises.

It was objected that the shares in a company incorporated under the provisions of the Joint Stock Companies Acts did not confer upon the holder a right to vote in respect of the lands held by the corporation: and the revising barrister decided against the claim. We think he was right.

The Joint Stock Companies Act, 1856, 19 & 20 Vict. c. 47, s. 13, provides, that, upon the incorporation of the company being certified by the registrar, the shareholders "shall thereupon be a body corporate by the name prescribed in the memorandum of association, having a perpetual succession and a common seal, with power to hold lands, but with such pecuniary liability on the part of the shareholders as is hereinafter mentioned:" and by the 15th section of the same act it is enacted that "the shares so issued shall be personal estate, and shall not be of the nature of real estate."

It being thus provided that the lands shall be held by the corporation, and that the shares shall be personal property and not in the nature of real property, we are of opinion that a shareholder, as such, can have no freehold estate, legal or equitable, in any lands so held by the corporation, and that his rights are confined to a proportionate share in the profits of the company. This opinion, which seems to us so entirely consistent with the legal constitution of a corporation, and the distinction, between the corporate body and its individual members, is fully sustained by the authorities on the subject. In Bligh *v.* Brent, 2 Y. & C. 268,† it was clearly laid down, that, in a joint stock company incorporated by act of parliament, the shareholders are entitled to no *30] direct interest in the *land held by the corporation; that no part of the realty is held in trust for them; but that all they are entitled to, is, that the property held by the corporation shall be used to create profits, in which they have a right to participate rateably according to the number of their shares. This case was recognised, and the principle of its decision acted on, in Hilton *v.* Geraud, 1 De Gex & Smale 183, and has never been departed from in any of the subsequent

cases. The decisions upon the mortmain acts also proceed on similar principles: see Sparling *v.* Parker, 9 Beavan 450; and Walker *v.* Milne, 11 Beavan 507. In Myers *v.* Perigal, 11 C. B. 90 (E. C. L. R. vol. 73), this court held that shares in a banking company, where the real estate was vested in trustees, and the shareholders were entitled to profits only, were not within the mortmain acts; and that decision was acted on by Lord St. Leonards, and is reported in 2 De Gex, M'N. & G. 599. In Watson *v.* Spratley, 10 Exch. 222,† a question arose whether shares in a mine conducted by a joint stock company on the cost book principle were an interest in land within the 4th section of the Statute of Frauds; and, although the court was divided as to whether the opinion of the jury should have been taken upon the facts of the case, yet all the judges agreed that the distinction above stated between the corporation and its members, in a joint stock company incorporated by act of parliament, in respect of lands held by the corporation, was well established.

We were pressed during the argument by the case of Baxter *v.* Brown, 7 M. & G. 198 (E. C. L. R. vol. 49) (nom. Baxter *v.* Newman, 8 Scott N. R. 1019, 1 Lutw. Reg. Cas. 287). There, partnership property, including lands, was conveyed to the use of trustees, and the deed of partnership provided that they "should stand seised and possessed thereof and interested therein upon trust for the benefit of themselves and their partners in the said joint concern as *part of their partnership joint stock in trade." There would be little doubt, that, [*31 under such a conveyance, the partners who were not trustees would still take an equitable interest in the lands of the partnership: but it was insisted, that, as it was provided by the deed that the property, including lands, "should be deemed and considered as or in the nature of personal estate, and not real estate," the partners had not such an equitable interest as entitled them to vote under any of the statutes which confer the franchise. This court, however, held that they *were* so entitled, notwithstanding the clause in the partnership deed above referred to, which, as a voluntary agreement by the partners inter se, might regulate the mode of enjoyment, but could not change the nature and quality of their estates. The Lord Chief Justice, however, in giving judgment, carefully distinguishes that case from one in which a company is incorporated by act of parliament, with a statutory declaration that the shares shall be deemed personalty, and not in the nature of real estate; in which latter case there could be no freehold interest in the several shareholders, so as to entitle them to vote.

The resolution of the House of Commons in 1624, which was cited in argument before us, could not of course deprive a party of any right of voting conferred by statute: but in this case it seems, so far as it applied to corporations aggregate, to have been a sound declaration of the law upon the subject: and the fact that members of such corporations have not been in the habit of voting in respect of lands held by the corporate body, is strong to show that the opinion we now distinctly express is that which has long been entertained.

The judgment of the revising barrister will be affirmed.

Judgment affirmed.

*32] *County of KENT.—Eastern Division.

JAMES ACLAND, Appellant; CHARLES EDWARD LEWIS, Respondent. *Nov.* 26.

The members of a corporation aggregate,—*e. g.* the "Company of Free Dredgers of Whitstable," incorporated by statute 33 G. 3, c. 42,—are not entitled to be registered in respect of the freehold property held by the corporation; they having no seisin, either legal or equitable, but a mere right to participate in profits.

At a court held for the revision of the lists of voters for the eastern division of the county of Kent, Edward Thomas Andrews duly claimed to have his name inserted in the list of voters for the parish of Sea Salter, in the said county, under the following circumstances:—

The claimant on the 31st day of July, and long before, had been, and still is, a freeman and member of a certain corporation called "The Company of Free Fishers and Dredgers of Whitstable, in the county of Kent," now consisting of three hundred and forty freemen or members, which corporation was created by the statute 33 G. 3, c. 42, intituled "An act for incorporating the company of free fishers and dredgers of Whitstable, in the county of Kent, and for the better ordering and government of the fishery."

By the preamble to this act it is recited, that "Whereas there hath time out of mind been an oyster fishery within the limits of the manor and royalty of Whitstable, in the county of Kent, extending from the sea-beach a very considerable distance into the sea, which fishery hath all that time been managed and carried on by and at the expense of a certain company of free dredgers called The Whitstable Company of Dredgers, who have held the same from time out of mind as tenants under the lord of the said manor and royalty on payment of a certain annual rent: And whereas by ancient usage and custom no persons are *33] entitled to dredge for oysters within the said manor *and royalty, except the members of the said company: And whereas the good order and government of the said fishery is of great public concern, and it would much tend to the carrying on and good management thereof, if the said company were allowed to purchase the said manor and royalty of Whitstable, or such part thereof as would be convenient for the better regulation of the said fishery: And whereas Thomas Foord, of the parish of St. Dunstan, near the city of Canterbury, in the county of Kent, gentleman, hath purchased, to him and his heirs, of the lord of the said manor and royalty, the said royalty of fishing and oyster-dredging, and the ground and soil of the said fishery from the south and south-east sides of the said sea-beach at Whitstable, as the same is and hereafter shall be thrown up by the sea from time to time, and the sea-beach and all lands and grounds from thence into the sea, as far as the said fishery extends, whether the same be more or less than the quantity of land now belonging to the said fishery; and also the customary payments usually and of right made to the lord of the said manor for or on account of any ship or vessel, or the landing of goods or merchandise within the said manor, or for the admission of freemen, or other payments for the regulation of the freemen and fishing there, and all other payments whatsoever to be made at the water court of free dredgers there, and all such like payments, and all manner of forfeitures, articles,

and things which of right belong unto and are the property of the lord of the said manor by reason of the wrecks of the sea, or other such like rights and forfeitures within the limits of the sea-beach aforesaid (subject to the right of the said company of dredgers in the said fishery), and also full power and authority unto the said Thomas Foord, his heirs and assigns, and every of them, to nominate or *appoint a steward [*34 or stewards, or water-bailiff or water-bailiffs, or other usual officers of the said fishery, and to summon and hold all such water courts or courts of dredging as shall be necessary to be held for any of the purposes aforesaid,—all which said estate, right, powers, and authorities the said Thomas Foord is willing to convey unto the said company and their successors for their own use and benefit: And whereas the said company are willing to purchase the royalty of the said fishery, but they are disabled from doing so, both because doubts have arisen whether the said company be a corporation in law, notwithstanding it has existed time out of mind, and likewise on account of the statutes of mortmain: Wherefore, for the better regulation and governing of the said fishery, and to remove any doubts concerning the company being a corporation, and to enable them to purchase the said manor and royalty of Whitstable, or such part thereof as shall be found convenient for the better management of the said fishery, be it enacted, &c., that the several persons at present composing The Whitstable Company of Dredgers, and all and every person and persons who now are or at any time hereafter shall be free of the said fishery, shall be, and they are hereby declared and adjudged to be, a distinct and separate body politic and corporate, in deed and in name, by the name or style of The Company of Free Fishers and Dredgers of Whitstable, in the county of Kent; and that by the above name they shall have perpetual succession and a common seal, with power from time to time to change, alter, break, and make new the same, when and as often as they shall judge the same to be expedient; and that they and their successors by the same name may sue and be sued, implead and be impleaded, answer and be answered unto, in all or by any court or courts of record and places of judicature within this kingdom."

*By the above statute, and by the by-laws and regulations made [*35 under the authority thereof, the said corporation purchased a part of the said manor and royalty in the said statute mentioned; and by certain indentures of lease and release thereupon made between Thomas Foord (in the said statute mentioned) of the one part, and the said Company of Free Fishers and Dredgers of Whitstable, in the said county of Kent, then lately incorporated, of the other part, and bearing date the 4th and 5th of June, 1793, he the said Thomas Foord did grant, bargain, sell, alien, release, and confirm unto the said Company of Free Fishers and Dredgers, and their successors and assigns, all that the royalty of fishing or oyster-dredging, and the right of taking oysters and other fish within the manor of Whitstable, in the said county, and the ground and soil of the said fishery, as therein mentioned; and also the customary payments usually and of right made to the lord of the said manor for or on account of the anchorage of any ship or vessel, or the landing of any goods or merchandise within the said manor, or for the admission of freemen, or other payments of the regulation of the freemen and fishery there, and all other payments whatsoever at the water court of free

dredgers there, and all such like payments, and all manner of forfeitures, articles, and things which of right belong unto and are the property of the lord of the said manor, by reason of any wrecks of the sea, or other such like rights and forfeitures arising within the limits of the sea-beach aforesaid, To hold the same unto the said Company of Free Fishers and Dredgers, their successors and assigns, to the only proper use and behoof of the said Company of Free Fishers and Dredgers, their successors and assigns for ever.

The said corporation did thereupon receive and take, and (with the *86] exception of the parts sold as thereafter *mentioned) have ever since enjoyed the said manor and royalty, and all the powers and privileges belonging thereto, and all matters and things conveyed thereby.

The said corporation or company have repaid all moneys borrowed and all debts of every kind at any time owing by the said corporation, and have received and taken to their own use the whole of the profits of the said manor and royalty. These profits, after deducting the expenses of working and management, have been divided proportionately amongst and received by the members of the corporation, and have always amounted and still do amount to a much larger annual sum for each member than 40*s.* a year. The corporation have also, under the powers of the said statute, at different periods, sold portions of their land so purchased and conveyed to them as aforesaid, and the purchase-money thereof was divided equally amongst the members, and was received and taken by them to their own individual use.

Of the ground or soil so purchased by the corporation, the greater part is permanently or periodically covered by the waters of the sea: but a portion is never covered by water. The former extends, and has always extended, from the shore upwards of two miles into the sea. The annual value of this portion to the corporation is more than 8000*l.* The annual value of that portion which is never covered by water is nearly 1000*l.*, and amounts to more than 40*s.* a year to each member. Of this latter portion of their ground or soil, the portion above stated to have been sold by the said corporation, and the produce of the sale of which had been divided amongst the members and appropriated to their individual use, is part.

The members have always considered and treated the whole of the property so held by them as belonging to themselves jointly, as liable *87] to be disposed of and *used by them for their own individual benefit, at the pleasure of the corporation.

Upon these facts, the said Edward Thomas Andrews claimed to have his name inserted in the list of voters aforesaid, as holding a freehold estate of the annual value of 40*s.* and upwards. But, as the revising barrister considered that the ground and soil and real property aforesaid were vested in the corporation, and not in the members thereof jointly, he refused to allow his claim.

The cases of several other members of the same corporation whose claims were rested upon the same ground, were consolidated with the principal case.

G. Denman, for the appellant.(*a*)—Adopting all the arguments urged

(*a*) The case was argued before Erle, C. J., Byles, J., and Keating, J., immediately after the case of Bulmer, app., Norris, resp., and before the judgment in that case was pronounced.

on behalf of the appellant in the last case, it is submitted that the decision of the revising barrister on this occasion was also erroneous. The case finds affirmatively the existence of everything necessary to confer upon the appellant the right of voting in respect of a freehold interest; and the only question is whether there is anything in the act of parliament incorporating the free fishers and dredgers of Whitstable to deprive them of that right. It is admitted that the right is gained by having an equitable freehold of the requisite yearly value. The disability of members of corporations aggregate to vote is founded upon the resolution of the committee of the House of Commons in the Cambridge Case in 1624;—a resolution which has been disapproved of by every writer on election law: see Rogers on Elections, 7th edit. p. 150; Elliott on Registration, 2d edit. p. 17; Warren's Election Law 70; Heywood's *County Elections 114. [ERLE, C. J.—Has the disqualification [*38
of members of corporations aggregate been made the subject of remark by any of our jurists? *Grant* referred to a note of Speaker Onslow on Burnet, Oxford edit. Vol. IV. p. 508, cited in a note to Hallam's Constitutional History of England, Vol. II. p. 596, referring to 10 Ann. c. 23, and 18 G. 2, c. 18.] This is widely different from the case of an ordinary corporation: the members have the entire interest in the lands vested in them. The act of incorporation recites that there hath been time out of mind an oyster-fishery within the limits of the manor and royalty of Whitstable, in the county of Kent, extending from the sea-beach a very considerable distance into the sea, which fishery hath all that time been managed and carried on by and at the expense of a certain company of free dredgers called The Whitstable Company of Dredgers, who have held the same from time out of mind as tenants under the lord of the said manor and royalty on payment of a certain annual rent; that, by ancient usage and custom, no persons are entitled to dredge for oysters within the said manor and royalty except the members of the said company; and that the good order and government of the said fishery was of great public concern, and it would much tend to the carrying on and good management thereof if the said company were allowed to purchase the said manor and royalty of Whitstable, or such part thereof as would be convenient for the better regulation of the said fishery. The act then proceeds to incorporate the company, and to enable them to purchase the manor and royalty. It was never intended to deprive the company of any rights which they before possessed; and it is submitted that there is nothing to prevent the members of such a corporation from having a vote. In Elliott 35, is a case having some analogy to the present,—"It appears *by the minutes of the Ros- [*39
common election committee, A. D. 1777, that several persons voted in right of eel-weirs in the Shannon; and Lord Clare, then at the bar, employed against the candidate for whom they voted, did not question the right:" Giff. on Elections 51; Hudson 74.

Macnamara, for the respondent.—The appellant has no freehold interest, legal or equitable, to entitle him to a vote. The rule deducible from all the authorities is, that the individual members of a corporation aggregate have no interest in lands held by the corporation; the whole seisin is in the corporation as distinct from its members. It is not like the case of a cestui que trust, who is the lawful owner of the land. In Viner's Abridgment, *Corporations* (H. 3), pl. 9, it is said: "If lands are

given to a corporation and their successors, and the corporation is dissolved, *the donor or his heirs shall have back the land again;* for, the same is a condition in law annexed to the estate, &c. Per cur. Godb. 211, pl. 301, Mich. 11 Jac. C. B., in the case of The Dean and Chapter of Windsor *v.* Webb." In Heywood's County Elections 114, it is said: "The freehold of lands belonging to an aggregate corporation is vested in the corporation itself, and not in the individual members of which it is composed; and therefore such corporators have not a right to vote for the lands of the corporation, for they have not such an estate in them as the law requires." Again, p. 119, it is said: "It has never been disputed that persons being sole corporations have a right to vote at the election of knights of the shire for lands which they hold in their corporate capacity, *i. e.*, to them *and their successors*, not to them *and their heirs*. The inclination of the House of Commons has generally been
*40] to enlarge the franchise of voting, and increase the number of *electors: it may have, therefore, been thought a distinction too refined to contend that a privilege merely of a personal nature ought to be annexed only to lands which a man holds in his personal capacity, and that his corporate possessions cannot give him individual rights." In Grant on Corporations, p. 1, the rule of law is thus given, upon the authority of numerous cases: "It has been said, in language which has attracted more animadversion for its quaintness than acquiescence in its accuracy, that a corporation aggregate is only in abstracto, and rests only in intendment and consideration of law,—is invisible, immortal, has no soul, neither is subject to imbecilities or death of the natural body. But it is quite true that a corporation aggregate is an abstract being, or a metaphysical body, and something altogether distinct from the aggregate of the individual members, as much so as they are from the rest of Her Majesty's subjects. We may here mention some instances to show this. A suit in Chancery by a corporation is not rendered defective by the death of one or more of the corporators, which it would be if a corporation consisted of its members in the same way that a partnership consists of the aggregate of its partners. A corporation may be seised in fee of a freehold, but in such case each corporator is not seised in fee of the land, or of any portion of it; the entire inheritance is in the corporation, which is something abstract from the body of existing corporators, and resides and is invested in, and 'stands upon' (10 Rep. 32 b, Sutton's Hospital Case) that body and their successors for ever. So, in respect of personal property vested in the corporation, the individual members are not owners of that property, nor is each of them owner of any part of it, nor are they joint owners of the whole, although they are each interested in the property, as they
*41] may derive *individual benefit from its increase, or loss from its destruction; but the abstract entity, the corporation, is the owner and the only owner of the property." In Ex parte The Lancaster Canal Company, 1 Deac. & Ch. 411, 431, where a question arose as to the property in canal shares, Sir E. Sugden, in the course of the argument, says,—"If the argument on the other side be good as to the nature of the property of the shares in question, viz., that it is real, then, in the case of every corporation that is possessed of realty, each individual corporator would be possessed of real estate. He would in right of it be entitled to vote in elections for parliament, and qualified

to sport, and to exercise all the rights attaching to real property. But it would be as great an absurdity to suppose he could have such rights, as to contend that he could enter and enjoy or grant leases of the land. On the contrary, even if he go upon the land (or, in this case, on the towing-path), he is liable as a trespasser: yet, who ever heard of a man being a trespasser on his own property? The real estate is possessed by *all* the corporators, quasi a corporation, which alone, *as a body*, and not the component members of it, has the seisin of the estates." So, in Male on Elections 268, it is said: "Corporations are divided into aggregate and sole. The former description of persons have not a right to vote for the lands of the corporation, for they belong to the aggregate body, and are vested in the corporation itself, not in the individual members of which it is composed, and consequently they have but individually such an estate in them as the law requires. In this respect it is they differ from joint tenancy or tenancy in common; for joint tenants and tenants in common are each seised individually,—the former, per my and per tout, the latter, of their respective shares in the land, which are several in interest though joint in possession, *until actual partition or severance is made." And see Co. Litt. 330 b, Butler's [*42 note, citing Doe d. Atkyns *v.* Horde, 1 Burr. 60, where Lord Mansfield defines seisin to be "a technical term to denote the completion of that investiture by which the tenant was admitted into the tenure." The interest of these parties may be transferred by parol, an instrument in writing not being necessary, as under the statute of frauds, for the conveyance of an interest in land. The subject is very elaborately and explicitly dealt with by Parke, B., in delivering the judgment of the Court of Exchequer in Watson *v.* Spratley, 10 Exch. 222,†—"In the case of joint stock companies incorporated by acts of parliament, who are generally possessed of land, the individual shareholders are quite distinct from the corporation. The shareholders are entitled to no direct interest in the land; no part of the realty is held in trust for them; but all they are entitled to is, that the real and personal property held by the corporation should be used by them for their benefit, so as to make profits, which, when made, are to be divided between them rateably, according to their number of shares, as personalty which might be disposed of by unattested will (before the Statute of Wills), and consequently could have been disposed of by parol. This was decided in Bligh *v.* Brent, 2 Y. & C. 294,†—a case which, we believe, has been universally acquiesced in, and followed by several other cases, amongst others, Hilton *v.* Geraud, 1 De Gex & S. 187." "In the case of Baxter *v.* Brown (Newman), where there was a fulling-mill held by trustees for the copartners under a partnership deed, the court, on the construction of that deed, held that there was a trust *of the real estate* for each copartner, and each copartner was held to be entitled to vote. Lord St. Leonards (Myers *v.* Perigal, 2 De Gex, M'N. & G. 599, 622), evidently is dissatisfied with that decision; *but, if the construction of the [*43 instrument was correct, and there was a direct trust of the real estate for each partner in proportion to their shares, the decision was no doubt perfectly right." Would the members of this company have acquired a settlement by estate in respect of their interest in the property vested in the body? The King *v.* The Inhabitants of Belford, 10 B. & C. 54 (E. C. L. R. vol. 21), shows that they would not. There the burgesses of the borough of Belford were entitled to receive such

share of the rent of certain estates as the corporation at large should allow them. The estates were vested in the corporation at large, and demised by lease, whereby the rents were reserved to the corporation: and it was held that a freeman of Belford, who resided in the borough, and was in the receipt of a portion of the rents, which had been assigned to him by the corporation, did not thereby gain a settlement by estate. Bayley, J., there says: "The estate was in the corporation." And Parke, J., adds: "The pauper had nothing but a privilege of taking a portion of the profits of the land at the will of the corporation." In Bligh *v.* Brent, 2 Y. & C. 295,† Alderson, B., says: "The individual members of a corporation are quite as distinct from the metaphysical body called 'the corporation' as any others of His Majesty's subjects are." There is nothing to distinguish the present from the ordinary case of a corporation aggregate. The free fishers of Whitstable are made a corporation for the express purpose of enabling them to acquire and to hold land.

Denman, in reply.—The case of Ex parte The Lancaster Canal Company, 1 Deac. & Ch. 431, can hardly be considered as an authority: no reasons are given for the judgment,—a circumstance which draws from the reporters an expression of regret, seeing the importance *of *44] the question to the commercial world. All the text-books on election law found themselves upon the same authority for the position now in question, viz., the resolution of 1624. Watson *v.* Spratley and the other cases referred to were all cases where the question turned on what was the nature of the shares in the particular company; but none of them touch the point now before the court, viz., what is the meaning of "free land" in the statute 10 H. 6, c. 2? *Cur. adv. vult.*

KEATING, J., now delivered the judgment of the court:—

This was a consolidated appeal against a decision of the revising barrister for the eastern division of the county of Kent.

It appeared that one Edward Thomas Andrews, with a number of other persons, a list of whose names, &c., was appended to the case, claimed to have their names inserted in the list of voters for that county, as members of a certain corporation called "The Company of Free Fishers and Dredgers of Whitstable, in the county of Kent," and as entitled to freehold estates in respect of such membership. The revising barrister disallowed the claims so made: and we think he was right in so doing.

The corporation of which the claimants were members was created by an act of parliament of the 33 G. 3, c. 42, which,—after reciting that a certain company called "The Whitstable Company of Dredgers" had from time out of mind held and carried on under certain regulations an oyster-fishery as tenants under the lord of the manor of Whitstable, on payment of an annual rent, and that it was desirable that the company should be allowed to purchase the whole of the *said manor and *45] royalty, but that they were disabled from so doing both because it was doubtful whether they were a corporation in law, and also on account of the statutes of mortmain,—proceeded to enact that the said company should thenceforth be incorporated by the name of "The Company of Free Fishers and Dredgers of Whitstable, in the county of Kent," with perpetual succession and a common seal; and that the corporation should exercise all the powers of the old company, and have power to purchase, have, take, and enjoy the manor and royalty, and,

when purchased, to sell and mortgage the same, and, under certain regulations, to borrow money, to be secured by bonds under the common seal of the corporation.

In pursuance of the powers thus given, part of the said manor and royalty was soon after the passing of the act purchased by and duly conveyed to the corporation, their successors and assigns, to the only proper use and behoof of the corporation, their successors and assigns.

It appears to us to be clear that the effect of this act of parliament, and of the conveyance in pursuance thereof, was, to vest the property of the company in the corporation, and that the members individually had no seisin, legal or equitable, in any of the lands so purchased and held, nor any freehold interest so as to entitle them to vote under the act of H. 6, or any of the more recent statutes. The legal estate was undoubtedly in the corporation; and although the profits, when realized by the corporation, were divisible amongst the members rateably, yet it appears to us, looking to the act of parliament and the finding of the revising barrister, that the right of the individual members was confined to a share in the profits when ascertained by a deduction of the expenses, and did *not extend to any legal or equitable interest in the land itself. [*46

The case, therefore, comes within our decision in Bulmer, app., Norris, resp., antè, p. 32, and the authorities there cited would have been applicable to it. The decision of the revising barrister will consequently be affirmed. Decision affirmed.

In some of the earlier American cases, shares in turnpike and railroad companies and other corporations dealing in land, have been held to be real estate and descendible as such: Welles *v.* Cowles, 2 Conn. 567; Price *v.* Price, 6 Dana 109; see Cape Sable Company's case, 3 Bland's Chancery 606. If this be so, it might perhaps be contended, that the members of such a corporation have a direct interest in the land itself, in other words, that the corporation should be considered as a sort of partnership with limited liability. For it is difficult to see, except upon some such hypothesis, how the nature of the corporate property can determine the character of a corporator's rights. The tendency of the decisions is now, however, to treat such shares as personal property, and, indeed, they are usually made such by statute: Johns *v.* Johns, 1 Ohio St. 351; Arnold *v.* Ruggles, 1 Rhode Island 165; Tippets *v.* Walker, 4 Mass. 596; Howe *v.* Starkweather, 17 Mass. 243; Russell *v.* Temple, 3 Dana's Abr. 108. There is doubtless great practical convenience in the latter doctrine, as it excludes many embarrassing questions, which must otherwise arise between heir and executor, where the company also possesses and deals with personal estate, as is most often the case. It seems, also, the most correct on principle, because the rights of the shareholder, so far as he can be considered as distinct from the corporation itself, only extend to compelling the latter to employ the corporate property for its legitimate purposes, and to share in any profits arising therefrom; and are, therefore, strictly in the nature of rights of action. See Union Bank of Tennessee *v.* State, 9 Yerg. 119; Brightwell *v.* Mallory, 10 Yerg. 196; State *v.* Franklin Bank, 10 Ohio 91; Slaymaker *v.* Gettysburg Bank, 10 Barr 373.

END OF THE REGISTRATION CASES.

IN THE HOUSE OF LORDS.

TRINITY VACATION, 1860.

WHEATCROFT and COX *v.* HICKMAN. *August* 3.

The proper test of liability as a partner is not whether the party sought to be charged has stipulated for a participation in profits as such, but whether the person by whom the trade was actually carried on carried it on in the capacity of agent for him.

A. and B., who carried on the business of iron-masters in copartnership, by a deed, purporting to be made between A. and B. of the first part, five persons named as trustees of the second part, and the several persons whose names were contained in a schedule as creditors for the sums therein mentioned, and who should execute the deed, of the third part,—reciting that the said A. and B. were indebted to the several persons parties thereto of the third part, and that they had agreed to assign all their estate and effects for the benefit of such creditors,—assigned the works and all their property and effects to the trustees, upon trust, amongst other things, *to carry on the business* under the name of "The Stanton Iron Company," and *out of the profits* to pay interest on mortgages, &c., and to "*pay and divide the net income of the business remaining after answering the purposes aforesaid, unto and among all and singular the creditors of A. and B., in rateable proportions, according to the amount of their respective debts* :—

Held, by the House of Lords,—reversing the judgments of the courts below,—that, under this deed, the *creditors* executing it did not become liable *as partners* for debts contracted by the trustees in carrying on the trade.

BENJAMIN SMITH and Josiah Timmis Smith carried on business as iron-merchants at the Stanton Iron Works, in the county of Derby, under the firm of Benjamin Smith & Son. In the year 1849, the Smiths, being in difficulties, executed a deed under which all their property was conveyed to trustees for the benefit of their creditors.

The deed bore date the 13th of November 1849, and purported to be made between Benjamin Smith and Josiah Timmis Smith (described as carrying on business in copartnership as iron-merchants at the Stanton Iron Works, in the county of Derby) of the first part, Francis Sandars, John Thompson, James Haywood, David Wheatcroft, and Samuel Walker Cox, of the second part, and the said John Thompson, James Haywoood, David Wheatcroft, and the several other persons and public companies whose names were set forth in the schedule thereunder written, and whose hands or names and seals were thereunto subscribed and
*48] affixed by *themselves or their respective partners, directors, trustees, public officers, agents, or attorneys, being respectively joint creditors of the said Benjamin Smith and Josiah Timmis Smith, or separate creditors of the said Benjamin Smith and Josiah Timmis Smith respectively of the third part. It then recited that the said Benjamin Smith and Josiah Timmis Smith had for some time past carried on business in copartnership as iron-masters and iron-merchants under the firm of Benjamin Smith & Son, at the Stanton Iron Works aforesaid, erected and being in or upon certain lands held (together with the ironstone thereunder) under a lease thereof granted to the said Benjamin Smith and Josiah Timmis Smith for the term of twenty-one years from the 25th of March, 1846, by an indenture dated the 27th of April, 1846,

and made between the Rt. Hon. Philip Henry, Earl of Stanhope, of the one part, and the said Benjamin Smith and Josiah Timmis Smith of the other part: and that the said Benjamin Smith and Josiah Timmis Smith were jointly, and they respectively, or one of them, were or was separately, indebted to the persons and companies parties thereto of the third part, in the several sums set opposite their respective names in the schedule thereunder written,—the first part of which schedule contained the names of creditors of Benjamin Smith separately, the second part thereof the names of creditors of Josiah Timmis Smith separately, and the third part the names of creditors of the said Benjamin Smith and Josiah Timmis Smith jointly: and that the said Benjamin Smith and Josiah Timmis Smith, for the purpose of satisfying their creditors, so far as they might be able, had agreed to assign all their estate and effects unto the said parties thereto of the second part, their executors and assigns, in manner thereinafter mentioned, upon the trusts and with and subject to the powers and provisions thereinafter expressed and contained; and that it had also been agreed that the *several creditors parties thereto of the third part should enter into such covenant not to sue the said Benjamin Smith and Josiah Timmis Smith as thereinafter contained. The indenture then witnessed, that, in pursuance of the said agreement, and in consideration of the premises, they the said Benjamin Smith and Josiah Timmis Smith, and each of them, did assign unto Sandars, Thompson, Haywood, Wheatcroft, and Cox, and their executors, administrators, and assigns, all and singular the lands, ironstone, coal, church, or fireclay and hereditaments comprised in the said indenture of lease of the 27th of April, 1846, and all other the lands, tenements, and hereditaments of or to which the said Benjamin Smith and Josiah Timmis Smith, or either of them, are or is possessed or entitled in reversion, expectancy, or otherwise, for any term or terms of years, either absolute or determinable on any life or lives or otherwise, together with all mines and minerals, buildings, erections, works, and fixtures thereon or therein respectively, and all rights, privileges, easements, and appurtenances thereto respectively belonging, either actually or by reputation enjoyed, or otherwise; and also all and singular the engines, machinery, gearing, plant, movable fixtures, tools, stock in trade, iron, ironstone, limestone, goods, wares and merchandise, household furniture, plate, linen, china, books of account, book and other debts, sum and sums of money, securities for money, policies of insurance, shares, rights, and interests; and all other the estate and effects whatsoever and wheresoever of them the said Benjamin Smith and Josiah Timmis Smith, and each of them, in possession, reversion, expectancy, or otherwise; and all the estate, right and interest, claim and demand whatsoever, at law or in equity, of them the said Benjamin Smith and Josiah Timmis Smith, and each of them, into, out of, or upon the said *premises respectively, or any of them, or any part thereof respectively,—To have and to hold all such and such parts of the premises expressed to be thereby assigned as were holden for any term or terms of years, unto the said Sandars, Thompson, Haywood, Wheatcroft, and Cox, and their executors, administrators, and assigns, for all the residue or respective residues then to come of the term or respective terms for which the same respectively were then holden, under and subject to the rents, covenants, conditions, and agreements thenceforth on the part of

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the lessee or respective lessees to be paid, observed, and performed; and to have and to hold all other the premises expressed to be thereby assigned, until the said Sandars, Thompson, Haywood, Wheatcroft and Cox, and their heirs, executors, administrators, and assigns, absolutely, —nevertheless, as to all and singular the premises expressed to be thereby assigned, subject to the legal mortgages and encumbrances then affecting the same,—and upon the trusts, and with and subject to the powers and provisions thereinafter expressed and contained. The trustees, Sandars, Thompson, Haywood, Wheatcroft, and Cox, were then appointed attorneys for the Smiths, to get in their debts, &c. And it was thereby agreed and declared, that the said Sandars, Thompson, Haywood, Wheatcroft, and Cox, and the survivors and survivor of them, and the executors or administrators of such survivor, should stand and be possessed of and interested in all such and such parts of the premises thereby expressed to be assigned as constituted separate property of the said Benjamin Smith and Josiah Timmis Smith respectively, upon trust that the said trustees or trustee should forthwith, or as soon as circumstances would allow, take possession of, collect, and receive the same, and sell and dispose of and convert into money such parts thereof as did not consist of *51] *money, and should pay and divide the moneys to arise from such taking possession, collection, receipt, sale, disposition, and conversion (after defraying thereout all expenses attending the same), and also the net rents, issues, and profits of the said separate property until sale and conversion thereof, unto and among all and singular the separate creditors of each of them the said Benjamin Smith and Josiah Timmis Smith respectively, in rateable proportions, according to the amount of their respective debts, and to pay over and apply any surplus arising therefrom in manner thereinafter directed with respect to the joint property of the said Benjamin Smith and Josiah Timmis Smith, subject, nevertheless, to the provisions thereinafter contained. And it was thereby agreed and declared that the said trustees, and the survivors and survivor of them, and their and his assigns, and the executors and administrators of such survivor, should stand and be possessed of and interested in all such and such parts of the premises expressed to be thereby assigned, as constituted joint property of the said Benjamin Smith and Josiah Timmis Smith, upon trust that the said trustees or trustee did and should forthwith, or as soon as circumstances would allow, take possession of the same, and sell, dispose of, and convert into money such parts thereof as should not be necessary to carry on the said business (not exceeding in estimated value the sum of £4000), under the trust for that purpose thereinafter contained, and collect and receive such parts thereof as consisted of debts or moneys due or owing or payable or to become payable to the said Benjamin Smith and Josiah Timmis Smith jointly, and hold and dispose of the moneys to arise by all or any of such means (after payment thereout of all expenses attending the same), and by the net rents, issues, and profits of the last-mentioned *52] trust premises, until sale and conversion *thereof, as part of the gross income to arise from the business to be continued and carried on under the trust in that behalf thereinafter contained: *And upon further trust that they the said trustees or trustee, and their or his assigns, did and should continue and carry on, under the name or style of the Stanton Iron Company, the business theretofore carried on by the said Benjamin Smith and Josiah Timmis Smith in copartnership as*

aforesaid, and, for that purpose, use, occupy, manage, maintain, and employ the said work and all other the joint property thereby assigned, in such manner as the said trustees or trustee should deem expedient; with full power for the said trustees or trustee, and they were thereby authorized and empowered, to hold any portion of the trust property for the space of two calendar months from the date thereof undisposed of, if they should so think fit; and, further, for the said trustees or trustee from time to time to sell and convert into money any trust property for the time being used in or held for the purposes of the said business, and which they or he might think it unnecessary to hold or retain, or advisable to dispose of for the purposes thereof, and the money to arise thereby, after payment thereout of all expenses attending such sale and conversion, to be held and disposed of as part of the gross income arising from the said business; and with power as occasion might require to procure any new or renewed lease of any part of the business property for the time being held under lease, on such terms as they or he might deem expedient, and to pay the fines, premiums, and expenses for and attending any such new or renewed lease out of the income arising from the said business; and with power to insure any of the business property, &c.; and with power for the said trustees or trustee from time to time to erect, make, procure, and employ *all such buildings, erections, ways, works, engines, machinery, live and dead stock, carriages, tools, implements, conveniences, and things whatsoever, as they or he should think necessary or convenient for the purpose of the said business, and to maintain and keep, repair, alter, remove, dispose of, and replace the buildings, erections, ways, works, engines, machinery, live and dead stock, carriages, tools, implements, conveniences, and things for the time being used in or held for the purposes of the said business, as they or he should think fit; and with power to sell and dispose of the iron already or thereafter to be made, obtained, or manufactured, and other the stock in trade for the time being, at such times, upon such terms, and in manner in all respects as they or he should think fit; and with power, for any of the purposes aforesaid, or otherwise in relation to the said business, to employ all such managers, overseers, viewers, clerks, travellers, agents, workmen, miners, servants, and other persons, as the said trustees or trustee should deem expedient, and to pay or allow them such salaries, commission, wages, or other remuneration, as they or he should think fit; and generally with full power for the said trustees or trustee to enter into, make, do, and execute all such contracts, agreements, instruments, acts, deeds, matters, and things whatsoever in or about or in relation to the continuing and carrying on the said business as they or he should think proper, as fully and effectually to all intents, effects, and purposes, as if they or he were or was solely and absolutely entitled thereto and to the property employed therein; and it was thereby declared and agreed that the clear rents, issues, and profits of any lands or other property for the time being held for the purpose of the said business should be applied as part of the gross income of the business, and that the said trustees or trustee should *by and out of the gross income of the business pay the rents and observe and perform the lessees' covenants and agreements reserved and contained in the said indenture of lease of the 27th of April, 1846, or in any other lease or leases under which any heredita-

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ments for the time being held for the purpose of the business should be holden; and also pay and discharge the interest as it became due and payable upon the said mortgages and encumbrances, and also pay and defray all the costs and expenses of and relating to the preparing, engrossing, and executing those presents, and also all costs and expenses to be incurred from time to time for any of the purposes thereinbefore expressed in the powers relating to the said business, and all other expenses and losses to be incurred or sustained in carrying on the said business as aforesaid; *and should pay and divide the net income of the said business remaining after answering the purposes aforesaid, unto and among all and singular the creditors of the said Benjamin Smith and Josiah Timmis Smith, and each of them, in rateable proportions according to the amount of their respective debts*,—subject, nevertheless, to the provisions thereinafter contained: provided always, that, in distributing such net income, the same should be deemed and taken to be the joint property of the said Benjamin Smith and Josiah Timmis Smith: And it was thereby agreed and declared that it should be lawful for the trustees or trustee, of their or his own accord, and upon the request in writing of any two or more joint creditors, parties thereto, whose debts should amount together to 3000*l.*, it should be incumbent upon the said trustees or trustee within seven days afer such request, from time to time during the continuance of any of the trusts thereby declared, to call a meeting or meetings of the joint-creditors at any place or places within or near
*55] *the town of Derby aforesaid [of which notice was to be given in manner therein provided]: And it was thereby also agreed and declared by and between all the parties thereto, that the majority in value of the joint creditors present at any such meeting, including trustees, being creditors, should have full power for the general benefit of the creditors to make, alter, add to, or diminish from the powers, trusts, and provisions therein contained, and to make any rules or directions relative to the discontinuance of the said business, and the present or future management thereof, and of any property for the time being used therein or connected therewith, and relative to the commencement, prosecution, or defence of any action, suit, or other proceedings, and the payment, agreement, or composition with any party whatever, of any debt, contract, matter, or thing in respect of or relating to the said business or the joint property; and that the same, and all such orders and directions should be binding and conclusive upon all creditors, whether concurring in making the same or not: And it was thereby further agreed and declared, that, whenever the majority in value of the joint creditors present at any such meeting as aforesaid should order or direct the discontinuance of the said business, the same should be discontinued, either immediately or at such time and in such manner as should be directed by any such order or direction as aforesaid; and thereupon, or as soon thereafter as circumstances would admit of, the said trustees or trustee should wind up the affairs of such business, and sell and dispose of, collect, and convert into money the said works (subject as aforesaid), goodwill, stock in trade, assets, and effects thereof, and all other trust property for the time being held for the purpose thereof or connected therewith, and should, by and out of the moneys to arise by such sale,
*56] disposition, collection, and *conversion into money, pay, defray, and satisfy all the costs and expenses of or attending the same,

and the costs of and relating to the preparing, engrossing, and executing those presents (so far as the same should not have been otherwise satisfied), and all the debts, contracts, engagements, and liabilities of the said business which should have been incurred by the trustees or trustee as aforesaid, and all costs, charges, losses, and expenses incurred in the management of the said business, or connected with the carrying on or winding up of the same, and should pay and divide the clear residue of the said moneys unto and among all and singular the creditors of the said Benjamin Smith and Josiah Timmis Smith, and each of them, in rateable proportions, according to the amount of their respective debts,—subject, nevertheless, to the provisions thereinafter contained.

The deed then contained provisions for the distribution of the joint and separate estates,—for payment of debts secured by mortgage, &c.,—for the keeping and inspection of accounts, and their production at meetings,—power to the trustees to compromise debts, to refer disputes to arbitration, to employ the Messrs. Smith to assist in the execution of any of the trusts, to sell by auction, &c., and, the debts being satisfied, to hold the residue for the Messrs. Smith, their executors, &c. Provided always, and it was thereby agreed and declared, that, if the said trustees thereinbefore named, or any of them, or any trustee or trustees to be appointed as thereinafter mentioned, should die, or be absent from the kingdom more than six calendar months at any one time, or desire to be discharged from or refuse or become incapable to act in the trusts or powers thereby in them reposed or to them given as aforesaid, before the same should be fully executed, performed, or discharged, or become incapable of *effect, then and so often as the same should happen it should be lawful for the surviving or continuing trustees or trustee for the time being, by and with the consent of the majority of creditors in value attending any meeting to be called as aforesaid, or for that purpose specially, from time to time to appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying, &c., &c. [*57

The deed further contained the usual indemnity clause, and a declaration that those presents were made with the intention, and upon the condition, that all creditors executing or becoming otherwise bound by the same, were to accept the provisions for payment of debts thereby made, in full satisfaction of their respective claims and demands upon the said Benjamin Smith and Josiah Timmis Smith, and each of them, jointly and respectively, but without prejudice to any rights or remedies as to third persons; a covenant not to sue the said Benjamin Smith and Josiah Timmis Smith, or either of them, and that, "in case any of the said covenanting parties, or any creditors who should become bound by those presents pursuant to the provisions of the Bankrupt Law Consolidation Act, their or any of their respective heirs, executors, administrators, or assigns, should commence or prosecute any such action, suit, or other proceeding contrary to the true intent of those presents, the said Benjamin Smith and Josiah Timmis Smith, or either of them, their or either of their heirs, executors, or administrators, might plead those presents as a general release in bar thereof;" and a proviso, that, in case the deed should not within three calendar months be executed by or on behalf of six-sevenths in number and value of the joint creditors of the Smiths whose debts respectively amounted to 10*l.* and upwards,

*58] the same should be void,—but *without prejudice to any act done by the trustees under or by virtue thereof in the mean time.

This deed was duly executed by the two Smiths, and by Sandars, Thompson, Haywood, Wheatcroft, and Cox, as trustees, and also by the required number of creditors, among whom were Wheatcroft and Cox, both of whom were also proved to have attended meetings of the creditors held pursuant to the deed.

Cox at first declined to accept the office of trustee, but eventually agreed to do so upon being indemnified; and Wheatcroft resigned the office within six weeks after the execution of the deed, and his resignation was accepted by the other trustees, but no new trustee was appointed in his place.

The business was carried on under the trusts of this deed down to the year 1855, in the name of The Stanton Iron Company. The plaintiff had supplied the company with iron-ore in the years 1853, 1854, and 1855. The supply in the latter year amounted to 1406*l.* 11*s.*, for which the plaintiff drew three bills of exchange, which were addressed "To the Stanton Iron Company," and accepted "Per prō. the Stanton Iron Company, James Haywood."

These bills having been dishonoured, the present action was brought against Cox and Wheatcroft, charging them as *partners* in the concern, —either as being trustees, or creditors for whose benefit the business was carried on, or as being persons who had been held out as partners.

The cause was tried before Jervis, C. J., at the sittings at Westminster after Hilary Term, 1856, when a verdict was found for the defendants, leave being reserved to the plaintiff to move to enter a verdict for him for the amount of the bills and interest, if the court should be of opinion that the defendants were under the circumstances liable as partners.

*59] *A rule nisi was accordingly obtained to enter a verdict for the plaintiff, which in Trinity Term, 1856, was made absolute,—the Court of Common Pleas holding, upon the authority of Owen *v.* Body, 5 Ad. & E. 28 (E. C. L. R. vol. 31), 6 N. & M. 448 (E. C. L. R. vol. 36), and Janes *v.* Whitbread, 11 C. B. 406 (E. C. L. R. vol. 73), that the creditors executing this deed became partners in the trade agreed to be carried on under it: see 18 C. B. 617 (E. C. L. R. vol. 86).

The defendants appealed from this decision; and the case was argued in the Exchequer Chamber on the 4th and 5th of February, 1857, and, after time taken to consider, that court gave judgment on the 25th of November, 1857,—Coleridge, J., Erle, J., and Crompton, J., agreeing with the court below that the creditors executing the deed became partners in the concern carried on by the trustees under it; Martin, B., Bramwell, B., and Watson, B., holding that they did not: 3 C. B., N. S. 523 (E. C. L. R. vol. 91).

Upon appeal to the House of Lords, the following question was propounded to the judges,—"Are the defendants liable upon these bills of exchange?"

The case was argued by *Sir R. Bethell*, A. G., and *Millward*, for the appellant Wheatcroft, and *Bovill*, Q. C., *Welsby*, and *Boden*, for Cox; and by *Rolt*, Q. C., and *Field*, for the respondent.(*a*)

(*a*) The "reasons" assigned on the part of the appellants were as follows:—

"1. That no liability attached to the appellant in consequence of having executed the said deed as a creditor of Messrs. Smith, or otherwise:

*The following were the authorities which were mainly relied upon,—Grace *v.* Smith, 2 Sir W. Bl. 998; Young *v.* Axtell, 2 H. Bl. 242; Waugh *v.* Carver, 2 H. Bl. 235; Cheap *v.* Cramond, 4 B. & Ald. 663 (E. C. L. R. vol. 6); Woodman *v. Baldock, 8 Taunt. 676 (E. C. L. R. vol. 4); The Bank of South Carolina *v.* Case, 8 B. & C. 427 (E. C. L. R. vol. 15), 2 M. & R. 459; Vere *v.* Ashby, 10 B. & C. 288; Owen *v.* Body, 5 Ad. & E. 28 (E. C. L. R. vol. 31), 6 N. & M. 448 (E. C. L. R. vol. 36); Pott *v.* Eyton, 3 C. B. 32 (E. C. L. R. vol. 54); Barry *v.* Nesham, 3 C. B. 641; Heyhoe *v.* Burge, 9 C. B. 431 (E. C. L. R. vol. 67); Janes *v.* Whitbread, 11 C. B. 406 (E. C. L. R. vol. 73); Bond *v.* Pittard, 3 M. & W. 357;† Re Stanton Iron Company, 21 Bevan 164, and Ernest *v.* Nicholls, 6 House of Lord Cases 401. [*60 [*61

The judges who heard the argument, viz. Pollock, C. B., Wightman, J., Williams, J., Crompton, J., Channell, B., and Blackburn, J., not being of accord, delivered their opinions seriatim, as follows:—

BLACKBURN, J.—My Lords, In my opinion, the defendants in this

"2. That the business carried on under the deed of the 13th of November, 1849, and in the name of the Stanton Iron Company, was carried on by the trustees thereunder, and they constituted the company, and not the general body of creditors of Messrs. Smith who executed the deed or were affected by its provisions,—the deed being binding on creditors who had not executed, under the provisions of the 224th and following sections of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106:

"3. That no authority was in any way conferred by the appellant upon James Haywood, who accepted the bills sued upon in the name of The Stanton Iron Company, to pledge the liability of the appellant by such acceptance or otherwise:

"4. That the persons, if any, made liable by such acceptance, were the trustees who were carrying on the business:

"5. That the appellant was not a partner or shareholder in any way in the said Stanton Iron Company, and had no right or power to interfere about the conduct of its affairs, and was not interested in its affairs further than the claim to have paid to him the amount due to him as a creditor of Messrs. Smith:

"6. That the position of the appellant is the same as if he had lent to the parties carrying on the business a sum equal to the amount of the debt due to him from Messrs. Smith, which amount, and no more, was to be repaid to him in course of time:

"7. That the appellant had no interest in any profits of the company, as such:

"8. That the appellant can be made liable only by showing that the acceptances in question are his own acts, which they are not; or, secondly, by showing that he authorised the person accepting to bind him by such acceptance, and there is nothing to show this; or, thirdly, by showing that the appellant so conducted himself as to induce people to treat the acceptance as binding upon him; and the judgment cannot be supported on this ground, because it appears that the appellant was not known as being connected in any way with the concern:

"9. That the appellant is not liable merely by reason of his name having been used as a trustee in the deed of 1849, he having ceased to be such immediately afterwards and long before the acceptances in question were given."

The respondent submitted that the judgment ought to be affirmed, with interest and costs, and the appeal dismissed, for the following amongst other reasons:—

"1. Because the appellant was entitled, under the provisions of the deed of the 13th of November, 1849, to the profits (if any) of the said business, and was liable to the debts and engagements of the same:

"2. Because the appellant was a party to the said deed of the third part, and was as such liable to the debts and engagements of the business thereby agreed to be carried on:

"3. Because the appellant was a member of the firm described in the said deed, and upon the acceptances in question, as The Stanton Iron Company:

"4. Because the business of The Stanton Iron Company was carried on by the appellant jointly with other persons, by the agency of the persons mentioned in the case as trustees:

"5. Because James Haywood, the person by whose hand the acceptances in question were made, had power to bind the appellant by such acceptances:

"Lastly, because the appellant is liable as a party to the said deed of the second part."

case are liable as acceptors of the bills of exchange declared upon. The
*62] question, in my *opinion, entirely depends on the effect of the deed of arrangement. If the effect of that deed is such that creditors executing it thereby give authority to those managing The Stanton Iron Company to bind them to third persons in the usual course of business by accepting bills, the defendants have given such authority. If the effect of the deed is not such that creditors executing that deed give authority to bind them as to third persons, the defendants are not shown to have given any authority: for, they have never acted as trustees; nor does it appear that they have done any act beyond what was proper to carry out the arrangement contained in that deed.

The principal object of the deed of arrangement is, to divide the property of the Smiths amongst the creditors according to the rules observed in bankruptcy; and, for this purpose, their property is assigned to trustees. The goodwill of the business which had been carried on by the Smiths under the style of Benjamin Smith & Son, was part of their joint estate; and those who had the making of the arrangement appear to have thought it a valuable part of the joint estate. Instead of disposing of it to third persons, or suffering it to be lost, the arrangement made, was, that the business should in future be carried on under a new style, that of The Stanton Iron Company, by the trustees, in the manner stipulated for in the deed to which the creditors are parties. The question, in my opinion, is, whether the stipulations are such as to render those creditors who are parties to the deed partners in The Stanton Iron Company, so far at least as regards liability to third persons.

Some of the judges in the court below have expressed an opinion that there is a distinction between the present question and that which would
*63] have arisen *if the question had been whether the defendants were liable for the consideration of these bills. I am, however, of opinion that no such distinction exists. I apprehend that all cases as to liability of partners to contracts are branches of the law of agency, and that the question always is, whether the contract entered into is within the scope of the authority conferred by those who are sought to be charged upon the person actually making the contract. But I take it, that, as matter of law, those who are partners in a trading firm do confer upon those who are permitted to manage the concern authority to make all contracts which in the exigency of the business are necessary and proper and customary. This primâ facie authority may be restricted by express agreement; but, unless those who deal with the firm have notice of this restriction, they are entitled to hold all who are partners bound by the primâ facie authority conferred on the manager; and that equally whether the persons sought to be charged were persons to whom the creditors gave credit, or dormant partners, of whose existence they were unaware. I think the justice of this rule as applicable to dormant partners very questionable; but I do not think it open to question that it is the rule of law. I think that, where, as in the present case, the accepting of bills is a necessary and customary part of the business, the authority to accept them is conferred as much as the authority to contract the debts for which they are given. It is true, the authority is limited to accepting bills in the name of the firm, and binds only those included in that firm; but all who are partners are included in the firm.

I think, therefore, as already said, that the question is, whether the stipulations in the deed are such as to constitute a partnership quoad third persons; and, to *determine that question, we must look to the terms of the deed. The material stipulations, as it seems to [*64 me, are the following:—The trustees are, as soon as possible, to convert into money such parts of the joint property of the two Smiths as shall not be necessary to carry on the said business (that excepted property not to exceed 4000*l.*); they are to carry on the business under the name of The Stanton Iron Company, for which purpose they are clothed with all the powers proper to be confided to the managers of such a concern. It is agreed, that, after paying all the expenses and losses to be incurred or sustained in carrying on the business, they shall pay and divide the net income of the said business remaining after answering the purposes aforesaid, unto and among the creditors of the Smiths, in rateable proportions, according to the amount of their respective debts, subject to the provisions thereinafter contained. The deed then provides that the trustees at any time may, and, on the requisition of joint creditors whose debts together amount to 3000*l.*, must, call a meeting of the creditors, and that the decision of the majority at such meeting shall have full power, for the general benefit of the creditors, to give any directions for the discontinuance of the business, or "for the present or future management thereof," which shall be binding on all the creditors, whether concurring or not. The Smiths have no vote in determining how the business is to be managed; and the trustees are absolutely bound to obey the directions of the meeting of creditors. If the concern is wound up, the clear residue of the moneys, after paying all expenses, shall be divided among the creditors of the Smiths rateably as joint property. It is provided, that, when the debts of the several creditors are paid in full, the trustees shall make over the property for the benefit of the Smiths; and this clause is *to be noticed as being the only clause in which the trusts are for the [*65 benefit of the Smiths, except so far as they are benefited by the liquidation of their debts. And it is to be noticed, that, from its nature, it can only come into operation when the trade of The Stanton Iron Company ceases. It is provided, amongst other things, that every creditor shall have a right at all times to inspect the books of the firm. No such power of inspection is given to the Smiths. Then follows a provision for the trustees, "by and with the consent of a majority of creditors in value attending any meeting of creditors," to appoint fresh trustees in the room of those retiring. The Smiths have no voice in this. Then follows an agreement that all creditors executing or becoming otherwise bound by the deed should accept its provisions in full satisfaction of their claim upon the Smiths; and that, in case any of them sue for their debts, this deed may be pleaded as a release.

These, I think, are the whole of the material parts of the deed. There is no stipulation in the deed as to who is to provide for payment of the partnership liabilities, in case the losses should be so great as to exceed the sum of 4000*l.*, which the trustees were authorized to retain for the purpose of carrying on the business. The parties seem not to have anticipated, or at all events not to have provided for, such a contingency, which, though a probable one, is often overlooked by those entering on a trade: but the rule of law is clear enough, that those who are partners

in the concern must bear such liabilities; so that I once more repeat, the question comes round to whether the stipulations are such as to constitute a partnership amongst the creditors.

Now, on looking at the provisions of the deed, it seems to me that
*66] they are, in substance, such as would *be proper if the creditors constituted themselves a Joint Stock Company, such as it would have been at common law, and made the trustees their managing directors, but agreed that the partnership should cease as soon as a certain sum, in this case the amount of their debts, was realized. I find that the business is to be carried on by the trustees under the control of the creditors, who may give what directions they think fit as to the management of the business; that the creditors are to have a voice in nominating fresh trustees, in case they are changed; and that the creditors are to have a right to inspect the books. And, moreover, I find that the creditors alone are to have these powers; no similar powers being given to the Smiths. Then I find also that the trustees are bound to pay over the net income, after paying all expenses of the concern, rateably among the creditors. It was suggested at your Lordships' Bar, that there was some distinction between the net income, after paying all outgoings, and the net profits; but I am unable to understand what that distinction is.

The arrangement is, that the trading might terminate on the creditors being paid; which, perhaps, was the termination which the persons entering into the arrangement hoped for. In that case, the deed provides that the property shall be made over to the Smiths; but, by so doing, the trade of The Stanton Iron Company ceases. Whoever the partners in that firm might be, they are no longer to carry on the business after the property is assigned to the Smiths. It might terminate by the concern being stopped by the creditors whilst it was yet solvent; that event is anticipated by the deed; and, in that case, it is provided that the surplus, after paying all losses, should be divided amongst the creditors. It might continue, for an indefinite period, neither so pro-
*67] ductive as to pay the *creditors in full, nor so bad as to be stopped; and, whilst it was so continued, the creditors were to have the net income or profits and the control of the management of the concern, and they were only to have these powers. Does this make them interested in the property or profits, so as to make them partners? That question depends on the effect of the deed; and it will be answered when we have determined the extent of their interest in the property of the firm. Suppose,—a not impossible case,—that the trustees had, as individuals, contracted a joint debt for some purpose unconnected with The Stanton Iron Company; could the partnership property of The Stanton Iron Company have been taken to pay that debt? Or, if the trustees had become reduced to one person, and he had become a bankrupt, would the assets of The Stanton Iron Company have passed to his assignees? Or, would the creditors who were parties to the deed of arrangement have been entitled in either case to say that the property was in equity theirs, and that the trustees, except in so far as they were creditors, had no beneficial interest in it? That is a question which depends on the construction of the deed. I think the construction of the deed is such that the creditors parties to the deed have bargained that they shall have a hold over the whole property of the firm, divided

or undivided; and I think this bargain is effectual; and, if so, that the creditors do take the profits of the concern, so as to make them their property before they are divided.

The deed does not provide what is to be done in the case which has actually happened, viz. that of the concern proving insolvent; but the law declares that those who take the profits of a trading concern, as such, are liable to the losses, even if they have stipulated to the *contrary: Waugh *v.* Carver (2 H. Bl. 235), 1 Smith's Leading [*68 Cases 786, and the notes thereto.

The phrase, taking the profits as such, is not a happy one; and there is some difficulty at times in defining what it means; but I think it at all events means this:—It is not possible, according to the common law, to cause a trading concern to be carried on upon the terms that the advantages of a partnership, including the participation in profits and the partnership lien and security over the assets of the firm, shall belong to those who have but a limited liability. I am aware of no case or authority inconsistent with the proposition thus guarded. Now, it seems to me that the present defendants have, by the deed to which they are parties, stipulated that the business shall be carried on for their benefit and under their control and that they shall be interested in all the property of the firm to such an extent as to have a partnership lien upon it. This shows that they are not merely persons permitting the Smiths or the trustees to carry on the business, and relying on it as a fund for payment, but that they take the profits as such; and, having done so, they are partners as regards third persons. I agree that the question is one of agency, viz. whether the defendants authorized the managers of this firm to bind them; but I think it is an incident attached by law to a participation in the profits to the above extent, that such authority is given to those managing the concern. I think, for the reasons I have given, that this arrangement deed does amount to a stipulation for a participation in the profits as such by the creditors.

For these reasons, I am of opinion that the defendants are liable as acceptors of the bills of exchange declared upon.

*Channell, B.—My Lords, The question proposed by your [*69 Lordships for the consideration of the judges, is, "Are the defendants in this case liable as acceptors of the bills of exchange declared upon?"

It appears to me that both defendants stand on the same footing; that both defendants are liable upon the bills, or neither. Cox never acted as trustee. Wheatcroft acted for a short time, but resigned his trust according to the provisions of the deed before the goods were supplied the price of which is sought to be recovered.

I do not rely altogether upon the distinction taken by those of the judges of the court below with whose judgments otherwise and in the result I agree; that is to say, on the distinction between an action on these bills and an action for goods sold and delivered.

If the deed does not constitute the defendants partners in the business carried on under the name of The Stanton Iron Company, upon whom the bills are drawn, the defendants are not liable on the bills; if the deed did constitute them partners in the business so carried on, they would be liable, both on the bills, and for the consideration of them. Their liability appears to me to depend entirely on the deed, for I see

nothing done by them at the meetings which they attended which can create a liability if the deed does not.

That deed contains no authority, I think, to pledge the credit of the defendants; but it is said that by executing the deed the defendants became partners as regards third persons, by reason of the interest they take in the net profits, and that the business carried on under the deed was the business of the defendants and the other creditors of the third part.

The provisions of the deed are carefully analyzed and sufficiently set forth in the judgment of the Master of the Rolls, which is with the *70] papers before your *Lordships; I refer to that judgment for the provisions of the deed.(a) I think that no new trade or concern was carried on. It seems to me that it was the old concern, though carried on under the management of trustees, and under a new name; that it was to be carried on by parties in whom the Smiths on the one hand, and the general body of creditors on the other hand, placed confidence, that is to say, by the trustees; but that it was the business of the Smiths; that the creditors who had rights against the Smiths, which they might have enforced by legal proceedings, in effect, in consideration of the arrangement that the trade for the future should be carried on by the trustees, and not under the management of the Smiths, agreed to forego their ordinary rights as creditors against their debtors, and to receive a sum equivalent to what was the amount of their debts, when the net profits (that is, as I understand, profits made after satisfying all new debts) should enable the trustees to pay the parties of the third part such equivalent sum.

The business was, I think, the business of the Smiths, carried on with a view to their ultimate benefit; and the fact that the creditors had power to put an end to the management by the trustees, and to discontinue the business, and to require the property, the capital, to be sold and divided amongst them in satisfaction or part satisfaction of moneys which, according to my understanding of the deed, and by virtue of the deed of arrangement, became a charge on the property of Messrs. Smith, does not vary the case so as constitute the creditors of the third part partners in the business. The creditors of the third part had no power, I think, by virtue of the deed, to take upon themselves the management of the business.

*71] *Supposing that I am wrong in considering the business carried on under the deed as the old business under a new name, and that the business is to be considered a new business, I think the creditors, parties to the deed of the third part, may be likened to parties who had made loans to the new partnership to the extent of their debts against the old concern, and that, by stipulating to receive payment of their loans out of the net profits, the amount to be received not varying with the rate of the net profits so as to give them any interest beyond the amount of their loan, they did not render themselves partners. That was the view taken by His Honour the Master of the Rolls with reference to this deed. No doubt, the judgment is to be considered as only deciding that this deed did not constitute a partnership within the meaning of the Winding-up Acts. But the whole reasoning goes to show, that,

(a) In re Stanton Iron Company, 21 Beavan 164.

in the opinion of that learned judge, there was no partnership created by the deed: and I adopt that view.

Cases were cited in the argument which appear to me to establish more or less clearly and satisfactorily certain principles of partnership law which do not apply to or govern this case; and it is not, in my view of the case, necessary to go into those authorities; but, as to Owen *v.* Body, 5 Ad. & E. 28 (E. C. L. R. vol. 31), 6 N. & M. 448 (E. C. L. R. vol. 36), I may say that I think that case only decided, that, where there was fair ground for contending that a certain proposed arrangement might amount to a partnership, a creditor might fairly object to execute the deed, and, so objecting, it was invalid against him, a non-executing creditor. See the observations of Maule, J., in M'Alpine *v.* Mangnall, 3 C. B. 496 (E. C. L. R. vol. 54).

Upon the whole, I think that an agreement by a debtor with his creditors, to apply net profits (if any) in payment of old debts, and on the part of the *creditors to give up their rights to be paid out of the capital, taking their chance of being paid out of the net profits which may be made after payment of new debts, does not create, as regards third persons, a partnership, such third persons not knowing of the arrangement, and not having trusted the creditors, and the creditors not having held themselves out to such third persons as parties liable. [*72

I therefore humbly answer your Lordships' question in the negative.

CROMPTON, J.—My Lords, I take the same view of the effect of the deed in this case that was taken of it by my Brother Coleridge in the Court of Exchequer Chamber; and I quite agree in the reasons he there gave for our judgment. Vide 3 C. B., N. S. 564 (E. C. L. R. vol. 91).

It seems to me that the old concern of the insolvents, Messrs. Smith, being put an end to, the creditors, by the deed in question, came to an agreement amongst themselves that the business should be carried on by their agents under a new firm, for their benefit.

Whilst such business was so carried on, and until the amount of the debts was paid off, or until they should choose to discontinue the business, the net income of the business was, by the express words of the deed, to be "divided amongst the joint creditors in rateable proportions according to the amount of their respective debts."

I cannot doubt that an arrangement so to carry on a business with such a participation of profits, renders the parties liable as partners to persons furnishing goods or giving credit, according to the course of trade, to the firm.

The question, therefore, seems to be whether the defendants in error were right in the construction they put on this deed. The plaintiffs in error contended *that the real effect was, that the trustees were trustees for the Smiths, that the property was to be theirs, and that it was their assent only which invested the trustees with their trust. But the Smiths were to have no management or control in the new concern; they were not to be summoned to any meetings or to have any right to interfere in the slightest degree with the management of the concern, or with the disposal of the property, or with the duration of the trade. If by any chance the amount of the twenty shillings in the pound should be ever realized, they might take the trade and any capital left to themselves, but the trustees were not to carry on the business for them. It seems strange to say that they were interested in the profits [*73

to arise whilst the business was being carried on under the deed, none of which profits they were to touch, but which were to go in discharge of debts to which they were no longer liable. They had in effect sold the business with its capital for so long a time as the creditors chose to carry it on for their own benefit, or until the amount of their abandoned debts should be realized. The creditors preferred to have the profits of the trade during the duration of the new business, to having the property which would have been distributable amongst them under a bankruptcy; and in effect they purchased the business for the limited time, each creditor giving up so much of his right to a share in the property, and by the deed his share of profits being proportionate to the amount of his abandoned debt. "The new provisions," that is, the payment from the profits, are expressly declared "to be a satisfaction;" and the formal words of immediate release are not included merely from fear of some technical difficulty as to collateral remedies; but, as between the Smiths and the individual creditors, the debts are entirely destroyed.

*74] *For whom, then, are the trusts as to the profits whilst the business lasts? Surely, not for the Smiths, who can have nothing out of the business of the firm in question whilst carried on by the trustees. Their assent was necessary, and the bargain was a good one probably for them; but they really have no more to do with the business than a solvent firm whose business is purchased,—as put by my brother Coleridge.

It need not be discussed whether the Smiths might be made liable as partners by reason of their very remote interest in getting back the business for themselves after payment of the twenty shillings in the pound. That business, if ever they were to get it, was not, however, a business to be carried on under the deed; for, there is no trust for carrying on the business when their time arrives. The trust is only to carry it on whilst the creditors are interested, and choose to have it continued. It is difficult to my mind to see that the Smiths can be termed participators in the profits, as they take nothing from the fund to which the new creditors of the firm may look.

Stress was laid upon the provisions of the deed wherein it is said that the moneys are to be deemed the property of the two Smiths. When looked at, however, this provision points only to the joint and not the separate property, and regulates the distribution amongst the joint creditors. And, even if that were not so, such a provision could not alter the real nature of the transaction, according to which the property was by a binding deed to be traded with for the benefit of the creditors, and might be entirely lost or disposed of by them, and could not be withdrawn or touched by the Smiths so long as the creditors chose to carry on the business for their own benefit; and the only interest of the Smiths was in the somewhat remote contingency of the payment of the twenty shillings in the pound.

*75] *It cannot alter the question, that the legal property was vested in trustees for the creditors. The creditors had the equitable property and the full control over it vested in them, whilst the partnership lasted; and the trustees, as trustees, had no beneficial property whatsoever; and it can be of no consequence that the legal property in the capital of a concern is vested for convenience in trustees or managers.

But it is said that the trustees are the persons really liable. If they

are liable, they must be liable as holding themselves out to the world, as it is called, as the real contractors. As creditors, two of them are in the same position as the rest of the creditors; but, taking them to be trustees merely, they could only be liable as the ostensible partners, as they really have no interest as trustees. They seem to me, however, as between them and the creditors, to be the mere agents of the creditors. The creditors have the most entire control of the whole concern. They are expressly empowered to give any "orders or directions for the present or future management;" they are to direct the continuance or putting an end to the business, and to make any composition as to debts and as to the property; and they are the only persons to whom the managers can look for funds, in the event of the property left in the concern being lost or insufficient. These managers seem to me not to differ in any respect from the managers of a joint stock company. Suppose such a company to have started before the Joint Stock Companies Act, and to have gone on at common law, there must have been the same arrangements as here for meetings when the number was too large for each partner or member to act individually; and they must have had managers to act for them, in whom the legal property might probably be vested for convenience. Though called trustees in the deed, the *persons so intrusted were really managers, and, as far as the management of the concern went, the mere agents of the creditors, who had the entire control over them. [*76

In what, then, does the present case differ from that of ten persons setting up a new business in the names of two or three managers, they having to divide all the profits? The present case, indeed, is not even one of a trading in the names of the managers, but in a name which may comprehend any partners; and the clause of the deed so much relied on by the plaintiffs in error, which stipulates that they shall carry it on in the name of The Stanton Iron Company, must surely be quite inoperative as to any limitation of the liability to such persons, when the rule of law is so well recognised, that no agreement amongst partners can prevent the liability to third persons arising from the participation of profits. I can see no hardship, under this particular deed, in the creditors who are to have the profits being liable for the funds and goods from which the profits are to be made, except the general hardship of large liability from small investments, attempted to be remedied by the Limited Liability Acts.

The only authority at all at variance with the liability of the creditors, seems to be that of M'Alpine *v.* Mangnall, in which case, however, the point did not arise, and does not seem to have been very fully discussed, and in which it seems very probable that the deed was one according to which Bridson was himself to carry on the trade under inspection. On the other hand, Owen *v.* Body, and the recognition of that case by the Court of Common Pleas in Janes *v.* Whitbread, with the very decided approbation of Mr. Justice Maule in that case of the doctrine as explained by him, are in favour of the plaintiffs below.

* I cannot think that the limit of the amount which the parties are ultimately to receive, or the limited length of time during which the partnership may be carried on, or the object being to get more in payment of the debts than they would otherwise have done, or the fact that the debts might be paid and the interest in the profits of any one [*77

or more of the creditors might cease, can at all lessen the liability of the creditors. It seems to me, that, whilst the business is carried on for their profit under their control, they are liable for the debts of the concern upon very well-settled principles of law, which I think it would be dangerous to interfere with, except by an act of the legislature.

For these reasons, I answer your Lordships' questions in the affirmative.

WILLIAMS, J.—My Lords, I am of opinion that the defendants in this case are liable as acceptors of the bills of exchange.

The consideration of the case divides itself into two inquiries,—first, did the creditors who executed the trust-deed become partners in the business carried on by the trustees under the provisions of the deed? Secondly, if they did so, are they liable as acceptors of the bills on which these actions are brought?

The first question plainly depends on the construction of the trust-deed. On the part of the plaintiff it was argued, that the trust is for the benefit of the creditors; that the business is to be carried on solely for their benefit until their debts shall have been paid; and that the trustees are to carry it on under the authority of the creditors, as their agents. On the part of the defendants, it was argued that, the trust was rather for the benefit of the Smiths, the debtors, to enable them
*78] better to realize the assets to pay the *creditors in full, and to obtain a surplus for themselves; and, further, that the authority conferred on the trustees by the deed, to deal with the plant and other property necessary for the conduct of the business, and also to carry on the business itself according to the provisions of the deed, is conferred on them by the Smiths, and not by the creditors; so that the trustees ought to be regarded as agents for the Smiths, and not as agents for the creditors.

But I am of opinion that these latter arguments are not well founded. It appears to me that the true construction of the deed is, that the creditors in effect buy the goodwill of the business, and the means for carrying it on for their own benefit until enough shall have been earned to pay their debts in full, at the price of consenting to accept the provisions of the deed in full satisfaction of their claims against the Smiths, and of entering into the covenant not to sue them in respect thereof. The business is then to be carried on, not under the old firm of "Benjamin Smith & Son," but under the new firm of "The Stanton Iron Company." The profits are to be appropriated exclusively to the payment of the debts of the creditors until they are paid off; and the trustees are placed under the control of the general body of creditors, who may, at their pleasure, alter, add to, or diminish, the powers, trusts, and provisions of the deed, and may (in effect) appoint new trustees, and may direct that the works shall be discontinued; and, in such case, the trustees are to wind up the business, and, after paying all the expenses and liabilities, divide the clear residue amongst the creditors rateably, in proportion to their respective debts. The effect of all these provisions appears to me to be, that the creditors, having by the sacrifice of their claims on the Smiths acquired the means of carrying on a trade for
*79] their own benefit, arrange the *mode of doing so by constituting a certain number of themselves managers of the concern under the name of trustees, who are to carry it on subject to the control of the

general body. If this be the true construction of the deed, I do not see how it can be doubted that the business carried on under its provisions is, in effect, carried on by all the creditors as partners.

It remains to consider whether, supposing they were thus constituted partners, it follows that they are liable as acceptors of these bills. I have already had occasion to express my opinion that the business carried on under the provisions of the trust-deed must be regarded as in effect carried on by the trustees as managing partners for the general body of the creditors, under the firm of "The Stanton Iron Company." And, if this be so, it seems necessarily to follow, that, as against those with whom they deal, the creditors are to be deemed the company, and each creditor must be liable on the acceptances in question, inasmuch as they were accepted by one of such managing partners, in the name of the firm, for iron-ore previously delivered to the company by the plaintiff for the purposes of the works, it being the usual practice to give such bills for ore so supplied.

For these reasons, I have to answer your Lordships' question in the affirmative.

WIGHTMAN, J.—The appellants in this case were sued as acceptors of three bills of exchange, by the respondent, who was the drawer. The bills are directed to "The Stanton Iron Company, near Derby," and are accepted "Per pro. The Stanton Iron Company, James Haywood." The declaration alleges that the bills were directed to the appellants "by and under the name of The Stanton Iron Company," and that the appellants accepted them.

*It appears that the appellants and many other persons were creditors of Messrs. Benjamin Smith and Josiah Timmis Smith, [*80 who carried on business in copartnership as iron-masters and iron-merchants at the Stanton Iron Works, near Derby, and who, becoming insolvent, executed a deed of composition on the 13th of November, 1849. This deed purports to be made between the Smiths of the first part, Mr. Sandars and four other persons of the second part, and the several persons whose names are set forth in the schedule to the deed, being joint creditors of the two Smiths, or separate creditors of each of them respectively, of the third part. And by it the Smiths assign to Sandars and the four other persons of the second part all their property whatsoever, upon the trusts mentioned in the deed, and, amongst others, that they the said trustees and their assigns did and should continue and carry on under the name and style of "The Stanton Iron Company," the business theretofore carried on by the Smiths; and very general and extensive powers are given to them for carrying on the business; and it provides for their payment, out of the gross income of the business, of certain charges, and the expenses and any losses that might be incurred in carrying on the business; and then it directs that "they should pay and divide the net income of the business remaining after answering the purpose aforesaid unto and among all and singular the creditors of the Smiths, and each of them, in rateable proportions according to the amount of their respective debts,"—with an ultimate trust for the Smiths when all the debts of the creditors are paid, and with power for the trustees to employ such servants and agents, and at such salaries, as they think fit, and generally to make such contracts, and do all such things in relation to the carrying on the business, as they shall think

*81] proper, *as fully and effectually to all intents and purposes as if they were solely and absolutely entitled thereto.

The deed contains provisions for calling meetings of the creditors, and gives power to the majority in value of the creditors at a meeting to alter the trusts and make rules as to the management of the business and the discontinuance of it; and, if they ordered the discontinuance, the trustees were to wind it up. There is also a provision that the creditors who execute the deed, accept the provision for payment therein made in satisfaction of their claims upon the Smiths, who may plead that deed as a release.

Both of the appellants were named as trustees in the deed; but, as they both ceased to be trustees long before any question of liability arose, no argument is raised upon that point: but, if they are liable at all, they are said to be so by reason of their having executed the deed as creditors.

The question is, whether the creditors are, by the execution of the deed, partners with the trustees and inter se in carrying on the business,—or, rather, whether the creditors who executed the deed are not the real partners carrying on the business, and the trustees merely their agents, and not principals or partners, except as far as they are creditors executing the deed.

The bills are drawn upon The Stanton Iron Company, and accepted by Haywood, by procuration of the company. By the terms of the deed, the trustees are the persons who carry on the business under that name; and all the stock in trade and property of the concern would be vested in them, or it would be impossible for them to execute the trust. The iron which was the consideration for the bills would be part of the trust property vested in the trustees; but, if they did not happen to *82] be creditors, or had ceased to be creditors, *they would, according to the argument for the respondent, be merely the agents for the creditors, who are the persons really carrying on the business, and so not liable at all. Suppose that the trustees had not been creditors, and had accepted the bills in their own names, stating themselves to be The Stanton Iron Company, would the creditors have been liable upon that acceptance? I should think not: and that the trustees could not be considered as mere agents for the creditors.

It is said that a person who shares in net profits is a partner. That may be so in some cases, but not in all; and it may be material to consider in what sense the words "sharing in the profits" are used. In the present case, I greatly doubt whether the creditor who merely obtains payment of a debt incurred in the business, by being paid the exact amount of his debt, and no more, out of the profits of the business, can be said to share the profits. If, in the present case, the property of the Smiths had been assigned to the trustees to carry on the business and divide the net profits, not amongst those creditors who signed the deed, but amongst all the creditors, until their debts were paid,—would a creditor by receiving from time to time a rateable proportion out of the net profits become a partner? I should think not. In the present case neither of the plaintiffs in error, as an individual creditor, has any power or control over the trustees; and the relation of principal and agent can hardly exist between them.

The cases of Owen *v.* Body, 5 Ad. & E. 28 (E. C. L. R. vol. 31), 6

N. & M. 448 (E. C. L. R. vol. 36), and Janes *v.* Whitbread, 11 C. B. 406 (E. C. L. R. vol. 73), can scarcely be considered decisions which would govern the present case, for the reasons given by the judges in the court below, whose opinions were in favour of the appellants; and the case of Bond *v.* Pittard, 3 M. & W. 357,† which was much relied upon by Mr. *Rolt* for the *respondent, is clearly distinguishable, for, in that case, the two Brothers Watts were admitted by themselves [*83 and held out to the world as partners, and the only question was, how far their private agreement as to profit and loss would affect their rights or liabilities as general partners.

It appears to me, that, in the present case, the legal rights and liabilities in respect of the business carried on under the name of The Stanton Iron Company, are in the trustees, and that, at all events, the creditors are not liable upon bills drawn and accepted in such a manner as those in question; and that the procuration under which Haywood accepted the bills is not the procuration of the appellants, or of the creditors, but of the trustees; and that the appellants are not liable as acceptors of the bills. And I may further add, that I agree generally in the opinions expressed by those of the judges in the court below who were in favour of the appellants, and particularly in that expressed by my Brother Martin.

I therefore answer your Lordships' question in the negative.

POLLOCK, C. B.—My Lords, the question in this case is, whether the defendants below are liable on the bills which are the foundation of the action.

There is, I think, no distinction between one defendant and the other: on the contract both are liable, or neither is liable: and I own I do not see that any distinction can be drawn between this action on the bills and an action on the consideration for which they were given. I think the defendants below are liable in this action, if they would have been liable in an action for the goods supplied.

If the defendants below are liable it must be by virtue of the deed to which they became parties: no *other ground can be suggested. [*84 On the part of the plaintiffs in error, it was contended that there was nothing in the deed which authorized the trustees to pledge the credit of the parties to the deed of the third part: and, on examining the deed, to ascertain this, no such direct authority can be found. But it is contended for the defendant in error, that, by virtue of the provisions in the deed, the creditors became partners, and therefore they are liable whether their credit was pledged or not, and whether there was any express authority to pledge it or not; and I think it must be admitted that the conclusion is just, if the premises are true. And the question then arises, whether the interest which the creditors had in the profits to be made by the carrying on of the business under the deed, was such as to make them partners in respect to third persons. In order to examine this, let me put this case:—If a firm were in difficulties, and a person proposed to assist them by a loan of money, engaging to receive payment out of the profits only, and to make no claim in the event of there being no profits, but stipulating that one-half of the profits should be applied as they arose in payment of his debt, and that he should have power to see that this was done,—would he thereby become a partner, and liable for all debts contracted subse-

quently to this arrangement? On this very simple state of facts, there may possibly arise a difference of opinion; but I think a large majority of all lawyers and commercial men would decide at once that assistance so offered and so accepted would not make the lender of the money a partner as to third persons. If he took a warrant of attorney entitling him to enter up judgment at his pleasure, and sweep away in payment of his demand, capital, debts, profits, and everything, he certainly would not be a partner; but it is said, if he limits his claim to be paid out of
*85] profits only, his limited *right to payment creates an unlimited liability. I think, my Lords, there must be some fallacy in this; the conclusion to my mind appears to be so unjust and absurd, and so much at variance with natural equity.

The case before your Lordships may no doubt be put as being stronger in favour of a partnership than the case I have supposed; and I think it may be conceded to Mr. *Rolt's* argument in favour of the defendant in error, that, if his version of the transaction be the correct one, his conclusion is right. If the trustees be merely managers, on behalf of the creditors, of a new concern, and the business be carried on under their direction and for their entire benefit, it would be difficult to say that the conclusion would be wrong which asserted their liability to debts incurred.

I observed that the learned counsel more than once referred to what he expected a jury would decide by their verdict, as the conclusion to be drawn from the facts of the case. But the office of a jury is to decide between conflicting testimony, and not to arrive at conclusions of law from acknowledged facts. When no fact is in dispute (as is the case here), the courts of law generally decide for themselves what is the resulting legal conclusion, and do not speculate on what a jury would find.

The effect of the deed appears to me to continue the old concern, rather than to create a new one; but to put it under the management of the trustees, who are a sort of guarantee or security that the real contract shall be carried into effect; who are to protect the interests of Messrs. Smith on the one hand, from whom all their authority emanates, and of the creditors on the other, so that the creditors who give up their claim on the capital, provided they are paid out of the profits, shall have the profits so applied, if there be any. The debts of the creditors are not extinguished altogether; for, if the concern is unprofitable, the
*86] creditors *may require it to be given up, and the property to be sold and divided among them. The trustees act under a power of attorney from Messrs. Smith, and they are to continue to carry on the same business, to pay all rent and charges, but they are to apply the net income (of course, after satisfying all new creditors) in payment of the claims of the old creditors. The creditors have power to call meetings, and direct that the business shall be discontinued, and the property sold and divided rateably among the creditors; they have also power to make rules, orders, and directions; but, as I construe the deed, they have no power to interfere and take the management into their own hands. If the business is discontinued, all the effects are to be sold, all expenses are to be paid, all the debts, &c., of the trustees are to be discharged, and the clear residue is to be divided among all the creditors

as the joint property of Messrs. Smith. Provision is made for an allowance for the support of Messrs. Smith and their families.

The deed, when examined, appears to me not to justify the account of it given by Mr. *Rolt;* and the question remains, does the interest in the clear profits, such as it is, constitute a partnership according to the law of England? I shall very shortly advert to the cases cited.

In Owen *v.* Body, 5 Ad. & E. 37 (E. C. L. R. vol. 31), the judgment is very short, and amounts merely to this, that the possibility that the arrangement might be deemed a partnership was a sufficient ground for the creditors to decline executing the deed, and therefore it was invalid; and the case is so explained by Mr. Justice Maule, in M'Alpine *v.* Mangnall, 3 C. B. 496 (E. C. L. R. vol. 73). But neither the one case nor the other decides that such a deed would constitute a partnership as to third persons, any more than the case before the Master of the Rolls decides that such a deed would not constitute a partnership as to third persons. The cases of *remuneration to managers, agents, servants, or factors may be dismissed at once, as having no application to the present: and there is really no direct authority upon the point either way. [*87

There is a passage in Story on Partnership to which I wish to refer your Lordships, page 74, as clearly expressing the views I entertain: "In short, the true rule '*ex æquo et bono*' would seem to be, that the agreement and intention of the parties themselves should govern all the cases; if they intended a partnership in the capital stock, or in the profits, or in both, then that the same rule should apply in favour of third persons, even if the agreement were known to them; and, on the other hand, if no such partnership were intended between the parties, then that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons."

Taking this view of what the law is,—it seems to me that this arrangement, to apply future profits (if any) in payment of the old debts, the creditors being willing to give up their right to be paid out of the capital, and to take the chance of any profits, appears to me not to constitute a partnership as to third persons, who know nothing of the deed, and who have not trusted the creditors; and therefore the defendants below are not, in my opinion, liable as acceptors of the bills of exchange declared upon.

The House adjourned to consider the opinions of the learned judges; and on the 3d of August pronounced judgment, as follows:—

Lord CAMPBELL, C.—My Lords, The only question in these cases is, whether the defendants, by executing the deed of the 13th of November, 1849, as creditors of *Messrs. Smith, rendered themselves liable to the creditors who should afterwards deal with the trustees appointed by this deed to carry on the concern of Messrs. Smith under the new firm of The Stanton Iron Company. The plaintiff alleges, that, although the defendants never acted or held themselves out as partners in this new firm, and the creditors of this new firm, unaware of the deed, have dealt only with the trustees, the creditors of the new firm are entitled to sue the creditors of the old firm as partners in the new firm. [*88

It is quite clear that the creditors of the old firm, by executing the

deed, never intended to incur such a liability; and I think that the creditors of the new firm cannot be supposed to have dealt with this firm in the belief that they could have a remedy against all or any of the creditors of the new firm. Is there here such a participation in the profits of the new firm by the creditors of the old firm as to make them partners in the new firm? They certainly are not partners inter se,—as was properly held by the Master of the Rolls; (*a*) and they could derive no profit from the new firm beyond the payment of the debts due to them from the old firm. There was a formal release of these debts: but we must look at the real nature of the transaction, according to the understanding of all who were parties to it. The business of Messrs. Smith was to be carried on by the trustees till the debts of that firm were paid, and then the business was to be transferred back to Messrs. Smith.

The defendants can only be liable upon the supposition that the person who wrote the acceptance on the bills of exchange was their mandatory for that purpose. I do not mean to make any distinction between
*89] their *liability on the bills and their liability for the price of the goods supplied to The Stanton Iron Company, the consideration for the bills. But I am of opinion that the creditors of the old firm cannot be considered as having, by executing the deed, authorized the trustees as their agents either to purchase the goods or to accept the bills. I do not think that Waugh *v.* Carver, 2 H. Bl. 235, or Owen *v.* Body, 5 Ad. & E. 28 (E. C. L. R. vol. 31), 6 N. & M. 448 (E. C. L. R. vol. 36), or any of the cases relied upon by the plaintiffs, make out a participation of profits under this deed to constitute a partnership. I must, therefore, advise your Lordships to reverse the judgment of the Court of Common Pleas, and to adjudge that the defendants below are not liable as acceptors of the bills of exchange on which the action is brought.

Lord BROUGHAM.—My Lords, I entirely agree with my noble and learned friend in the view he has taken of this case.

Lord CRANWORTH.—My Lords, In this case the judges of the Court of Exchequer Chamber were equally divided,—three being of opinion that the defendant was, and three that he was not liable on the bills in question; and, unfortunately, the same difference of opinion has existed among the learned judges who attended this House during the argument at your Lordships' Bar. Except, therefore, from an examination of the grounds on which their opinions are founded, we can derive no benefit in this case from their assistance. We cannot say, that, in the opinions delivered in this House, there is more authority in favour of one view of the case than of the other. We must not, however, infer that your Lordships have not derived material aid from the opinions expressed by
*90] the judges. These opinions have stated the arguments *on the one side and on the other with great clearness and force; and what we have to do now, is, to decide between them.

In the first place, let me say that I concur with those of the learned judges who are of opinion that no solid distinction exists between the liability of the defendant in the action on the bills and in an action for goods sold and delivered. If he would have been liable in an action for goods sold and delivered, it must be because those who were in fact carrying on the business of The Stanton Iron Company were carrying

(*a*) Re Stanton Iron Company, 21 Beavan 164.

it on as his partners or agents. And, as the bills were accepted according to the usual course of business, for ore supplied by the plaintiff, I cannot doubt, that, if the trade was carried on by those who managed it as partners or agents of the plaintiff, he must be just as liable on the bills as he would have been in an action for the price of the goods supplied. His partners or agents would have the same authority to accept bills in the ordinary course of trade as to purchase goods on credit.

The liability of one partner for the acts of his copartner is in truth the liability of a principal for the acts of his agent. Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind them all by contracts entered into according to the usual course of business in that trade. Every partner in trade is, for the ordinary purposes of the trade, the agent of his copartners; and all are therefore liable for the ordinary trade contracts of the others. Partners may stipulate among themselves that some of them only shall enter into particular contracts, or into any contracts, or that, as to certain of their contracts, none shall be liable except those by whom they are actually made: but with such private arrangements *third persons dealing with the firm, without notice, have no concern. The public have a right to assume that every [*91 partner has authority from his copartner to bind the whole firm in contracts made according to the ordinary usages of trade.

This principle applies not only to persons acting openly and avowedly as partners, but to others who, though not so acting, are by secret or private agreement partners with those who appear ostensibly to the world as the persons carrying on the business.

In the case now before the House, the Court of Common Pleas decided in favour of the respondent, that the appellant, by his execution of the deed of arrangement, became, together with the other creditors who executed it, a partner with those who conducted the business of The Stanton Iron Company. The Court of Exchequer Chamber, on appeal to them, were equally divided, so that the judgment of the Court of Common Pleas was affirmed. The sole question for adjudication by your Lordships, is, whether this judgment thus affirmed was right.

I do not propose to consider in detail all the provisions of the deed. I think it sufficient to state them generally. In the first place, there is an assignment by Messrs. Smith to certain trustees of the mines and all the engines and machinery used for working them, together with all the stock in trade, and in fact all their property, upon trust to carry on the business, and, after paying its expenses, to divide the net income rateably amongst the creditors of Messrs. Smith as often as there shall be funds in hand sufficient to pay one shilling in the pound; and, after all the creditors are satisfied, then in trust for Messrs. Smith.

Up to this point, the creditors, though they executed the deed, are merely passive: and the first question is, what would have been the consequence to them of *their executing the deed, if the trusts had ended there? Would they have become partners in the con- [*92 cern carried on by the trustees merely because they passively assented to its being carried on upon the terms that the net income, *i. e.* the net profits, should be applied in discharge of their demands? I think not. It was argued, that, as they would be interested in the profits, therefore they would be partners. But this is a fallacy. It is often said that the

test, or one of the tests, whether a person not ostensibly a partner, is nevertheless in contemplation of law a partner, is, whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for, a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition, is, to say that the same thing that entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf, *i. e.* that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made.

Taking this to be the ground of liability as a partner, it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of *their demands, *93] does not make them partners with their debtor or the trustees. The debtor is still the person solely interested in the profits, save only that he has transferred them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors: their consent is necessary in such a case; for, without it, all the property might be seized by them in execution. But the trade still remains the trade of the debtor, though the trustees are the persons by or on behalf of whom it is carried on.

I have hitherto considered the case as it would have stood if the creditors had been merely passively assenting parties to the carrying on of the trade on the terms that the profits should be applied in liquidation of their demands. But I am aware that in this deed special powers are given to the creditors which it was said showed that they had become partners, even if that had not been the consequence of their concurrence in the previous trust. The powers may be described briefly as,—first, a power of determining by a majority in value of their body that the trade should be discontinued; or, if not discontinued, then,—secondly, a power of making rules and orders as to its conduct and management.

These powers do not appear to me to alter the case. The creditors might by process of law have obtained possession of the whole of the property. By the earlier provisions of the deed they consented to abandon that right, and to allow the trade to be carried on by the trustees. The effect of these powers is only to qualify their consent. They stipulate for a right to withdraw it altogether; or, if not, then to impose terms as to the mode in which the trusts to which *they had agreed *94] should be executed. I do not think that this alters the legal condition of the creditors. The trade did not become a trade carried on for them as principals, because they might have insisted on its being abandoned, or because they might have prescribed terms on which alone

it should be continued. Any trustee might have refused to act, if he considered the terms prescribed by the creditors to be objectionable.

Suppose the deed had stipulated, not that the creditors might order the discontinuance of the trade or impose terms as to its management, but that some third person might do so, if on inspecting the accounts he should deem it advisable,—it could not be contended that this would make the creditors partners, if they were not so already: and I can see no difference between stipulating for such a power to be reserved to a third person, and reserving it to themselves.

I have on these grounds come to the conclusion that the creditors did not by executing this deed make themselves partners in The Stanton Iron Company; and I must add that a contrary decision would be much to be deprecated. Deeds of arrangement like that now before us, are, I believe, of frequent occurrence: and it is impossible to imagine that creditors who execute them have any notion that by so doing they are making themselves liable as partners. This would be no reason for holding them not to be liable, if, on strict principles of mercantile law, they are so. But the very fact that such deeds are so common, and that no such liability is supposed to attach to them, affords some argument in favour of the appellant. The deed now before us was executed by above a hundred joint creditors; and a mere glance at their names is sufficient to show that there was no intention on their part of doing anything which should involve them in the obligations of a partnership. I do not rely on this: *but at least it shows the general opinion of [*95 the mercantile world on the subject. I may remark that one of the creditors, I see, is The Midland Railway Company, who are creditors for a sum only of 39*l.*: and to suppose that they could imagine that they were making themselves partners is absurd.

The authorities cited in argument did not throw much light on the subject. I can find no case in which a person has been made liable as a dormant or sleeping partner, in which the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it, and when therefore he would stand in the position of principal towards the ostensible members of the firm as his agents. This was certainly the case in Waugh *v.* Carver, 2 H. Bl. 235. There, Messrs. Carver, who were ship agents at Portsmouth, agreed with Gresler, a ship agent at Plymouth, that, if he would establish himself as a ship agent at Cowes, they would share between them the profits of their respective agencies in certain stipulated proportions. When, therefore, Gresler, in pursuance of the agreement, did establish himself at Cowes, and there carry on the business of a ship agent, he in fact carried it on for the benefit of Messrs. Carver as well as of himself; and the court held, that, in these circumstances, the stipulation which they had entered into, that neither party to the agreement should be answerable for the acts of the other, was a stipulation which they could not make, so as thereby to affect third persons. Each firm was carrying on business on account, not only of itself, but also of the other firm: this, therefore, made each firm the agent of the other.

The case of Bond *v.* Pittard, 3 M. & W. 357,† could admit of no doubt. The question was, whether G. F. Watts and P. H. Watts could sue jointly for business transacted by them as attorneys. They had

*96] agreed to *become partners, on a stipulation that P. H. Watts should always receive 300*l.* yearly out of the first profits as his share, and should not be liable for any losses. It was argued that this latter stipulation prevented them from being partners: but the court held the contrary. Each of them worked for the common benefit of both; and each of them, therefore, acted as agent of the other. The produce of the labour of each was to be brought into a common fund, to be afterwards shared according to certain arrangements between themselves. The case was really free from doubt.

A similar principle explains and justifies the decision of the Court of Common Pleas in Barry *v.* Nesham, 3 C. B. 641 (E. C. L. R. vol. 54). The question was, whether the defendant was liable for goods furnished to one Lowthin in the way of his business as the printer and publisher of a newspaper. Nesham had sold the stock and goodwill of the paper to Lowthin, in consideration of 1500*l.*, and on a further stipulation that for seven years the profits were to be applied as follows, that is to say, Lowthin was to have the first 150*l.* of the annual profits, then Nesham was to have them to the extent of 500*l.*, and Lowthin was to have all beyond. It is clear that Lowthin was conducting the business for the common benefit of both, subject to the private arrangements as to the shares they should separately be entitled to. Lowthin was therefore clearly the agent of Nesham.

Owen *v.* Body, 5 Ad. & E. 28 (E. C. L. R. vol. 31), 6 N. & M. 448 (E. C. L. R. vol. 36), was at most a dictum. The Court of Queen's Bench were quite right in holding that the creditors were justified in refusing to execute the deed tendered to them; and that is all that was decided.

None of the other cases cited carried the doctrine further than those I have referred to; and therefore I think that in this case the judgment appealed against ought to be reversed.

*97] *Lord Wensleydale.—My Lords,—These two cases come before your Lordships on appeal from the Exchequer Chamber, by which court a judgment of the Court of Common Pleas was affirmed. They both involved the same question. The Court of Common Pleas were unanimous in favour of the plaintiffs below. The Court of Exchequer Chamber, consisting of six learned judges, and also the six learned judges who gave their advice to your Lordships, were both equally divided. I am of opinion that the judgment of the Court of Common Pleas was wrong, and that it ought to be reversed.

The question is, whether the plaintiffs in error, the defendants below, both or either, were liable as acceptors of certain bills of exchange dated in March, April, and June, 1855, drawn by the plaintiffs below on the Stanton Iron Company, and accepted by one James Haywood as per pro. that company: and the simple question will be this, whether Haywood was authorized by the defendant, as one of the partners in that company, to bind him by those acceptances.

Haywood must be taken to have been authorized to accept for them by those who actually carried on business under that firm. Were the appellants, or either of them, partners in it at that time?

The case will depend entirely on the construction of the deed of the 13th of November, 1849. There is no other evidence affecting either of the defendants: and the question is, whether the subscription of both

as creditors of the Smiths made them partners in the business carried on by the trustees in the name of The Stanton Iron Company. Wheatcroft could not be liable in the character of trustee, for he had ceased to be such before the bills were drawn, and the plaintiff knew it.

The terms of the deed have been so fully brought *before your Lordships, that I do not consider it necessary to state them at any length. The deed is an arrangement by the Smiths, who had become insolvent, with their creditors who subscribe the deed, for assigning all their property to trustees, in trust to convert part, not necessary to conduct the business (and leaving 4000*l.* for that purpose), and divide the proceeds among the creditors, and then to continue to carry on, in the name of the Stanton Iron Company, the business lately carried on by the Smiths; and, for that purpose, to manage the works as they thought fit, with various powers,—to renew leases, insure, erect buildings and machinery, appoint managers and agents, enter into and execute all contracts and instruments in carrying on the business (and that provision would certainly authorize the making or accepting bills of exchange), and to divide the net income amongst the creditors in rateable proportions,—provided that, in distributing such income, it shall be deemed and taken to be the property of the Smiths; with power for the majority in value of the joint creditors, at a meeting, to alter the trusts, and make rules as to the discontinuance of the business and the management of it; and, ultimately, after paying the debts incurred in the business so carried on, to divide the residue of the moneys in rateable proportions amongst the creditors, with the same provision that the moneys are to be taken to be the property of the Smiths. The creditors are to receive the provisions of the deed in full discharge of their debts: they covenant not to sue; and the deed is to be void unless executed by six-sevenths of the creditors in number and value. [*98

The question is, whether this deed makes the creditors who sign it partners with the trustees, or, what is the same thing really, agents to bind them by their acceptances on account of the business.

The law as to partnership is undoubtedly a branch *of the law of principal and agent: and it would tend to simplify and make more easy of solution the questions which arise on this subject, if this true principle were more constantly kept in view. Mr. Justice Story lays it down in the 1st section of his work on Partnership. He says, "Every partner is an agent of the partnership; and his rights, powers, duties, and obligations are in many respects governed by the same rules and principles as those of an agent. A partner, indeed, virtually embraces the character both of a principal and an agent." Pothier says: "Contractus societatus, non secus ac contractus mandati:" Pand. Lib. 17, tit. 2, Introduction. [*99

A man who orders another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent; and the principal is liable for the agent's contracts in the course of his employment. So, if two or more agree that they should carry on a trade and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contracts in carrying on the trade, as much as a single principal would be by the act of an agent who was to give the whole of the profits to his employer.

Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment. I believe this is the true principle of partnership liability. Perhaps the maxim, that he who takes the profits ought to bear the loss, often stated in the earlier cases on this subject,—Waugh *v.* Carver, &c., —is only the *consequence*, not the cause, why a man is made liable as a partner.

*100] Can we collect from the trust-deed that each of the *subscribing creditors is a partner with the trustees, and by the mere signature of the deed constitutes them his agent for carrying on the business for his account and the rest of the creditors? I think not. It is true that by this deed the creditors will gain an advantage by the trustees carrying on the trade; for, if it is profitable, they may get their debts paid: but this is not that sharing of profits which constitutes the relation of principal, agent, and partner.

If a creditor were to agree with his debtor to give him time to pay his debt till he got money enough out of his trade to pay it, I think no one could reasonably contend that he thereby made him his agent to contract debts in the course of his trade; nor do I think that it would make any difference that he stipulated that the debtor would pay the debt out of the profits of the trade.

The deed in this case is merely an arrangement by the Smiths to pay their debts, partly out of their existing funds, partly out of the profits of their trade; and all their effects are placed in the hands of the trustees, as middlemen between them and their creditors, to effect the object of the deed,—the payment of their debts. It is placed in the hands of the trustees as the property of the Smiths, to be employed as the deed directs, and to be returned to them when the trusts are satisfied. I think it is impossible to say that the agreement to receive this debt so secured, partly out of their existing assets, partly out of the trade, is such a participation in profits as to constitute the relation of principal and agent between the creditor and the trustees. The trustees are certainly liable, because they actually contract by their undoubted agent; but the creditors are not, because the trustees are not their agents.

*101] The case of Owen *v.* Body, 5 Ad. & E. 28 (E. C. L. R. vol. 31), 6 N. & M. *448 (E. C. L. R. vol. 36), on which some reliance was placed, is really no authority for holding that the creditors by subscription become actual partners. In the short judgment of Lord Denman, the expression used is, not that the deed imposed such conditions as *would have* constituted a partnership amongst those who subscribed it, but as *might have* had the effect,—which is a much more doubtful expression. It was quite enough for the decision of that case, that the subscription exposed the creditors to the peril of being considered partners,—of which peril the opinions of the majority of the judges leave no doubt; and that prevented the deed from being a fair deed, and good against creditors. So did the provision that the effects which ought to have been divided equally amongst the creditors should be put in peril by being employed in trade.

The case of Janes *v.* Whitbread, 11 C. B. 406 (E. C. L. R. vol. 73), which was distinguished as authorizing a trader to wind up, can hardly

be supported on the ground of that distinction. It exposed the creditors signing to perils, though not in the same degree.

The case of Bond *v.* Pittard, 3 M. & W. 357,† cited on the part of the plaintiff, turned entirely upon the special circumstances, it being perfectly clear that both the two attorneys, of whom the plaintiff was assignee, were the parties with whom the contract was made, irrespective of the circumstance of the payment of a fixed sum being made to one out of the profits. It was not that fact that was considered to make them partners: it was not necessary to decide that point.

I therefore advise your Lordships to reverse the judgment.

Lord CHELMSFORD.—My Lords, I agree entirely in the opinions which have been expressed by my noble and learned friends; and, as I can add nothing to the *strength and clearness of their arguments in favour of the conclusion at which they have arrived, I shall satisfy myself by simply expressing my concurrence with them that the judgment ought to be reversed. [*102

Bovill, Q. C.—My Lords, In these appeals under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 42, the costs do not necessarily follow the decision, but are in the direction of your Lordships.

Lord CAMPBELL, C.—We never give costs to the appellant in the case of a reversal. And, if we had power to give costs, considering the marvellous diversity of opinion among the judges in the courts below, this is certainly not a case in which we should be disposed to give costs on either side.

Decision reversed.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas Term,

XXIV. VICTORIA. 1860.

The Judges who usually sat in banc in this term, were,—

ERLE, C. J. BYLES, J.

WILLIAMS, J. KEATING, J.

VAUGHTON, Appellant; BRADSHAW, Respondent. *Nov.* 20.

The plaintiff laid an information for an assault under the 9 G. 4, c. 31, s. 27, and took out a summons, which was served on the defendant. Afterwards, and before the day for hearing, the plaintiff, by his agent, gave notice both to the defendant not to attend, and to the magistrates' clerk that *he* should not attend. The defendant attended, and claimed to have the information dismissed, and a certificate of dismissal granted under the statute, notwithstanding the plaintiff's absence:—Held, upon the authority of Tunnicliffe v. Tedd, 5 C. B. 553, that the magistrates were warranted in granting such certificate, and that the certificate was a bar to an action for the same.

THE plaintiff, a minor, sought by his father and next friend to recover in the Shropshire county court damages for an assault alleged to have been committed upon him by the defendant on the 13th of June last. The damages were laid at 50*l*.

Two defences were relied on,—first, a justification upon the facts,—
*104] secondly, a certificate of magistrates' *dismissal under the 9 G. 4, c. 31, ss. 27, 28. Both parties called witnesses as to the facts connected with the alleged assault and justification. In support of the second ground of defence, the following facts were proved on behalf of the defendant:—

On the 18th of June last, the plaintiff went before Mr. Loxdale, a magistrate for the county of Salop, and on oath preferred an information against the defendant, of which the following is a copy:—

"County of Salop } The information and complaint of Charles Brad-
to wit. } shaw, of the parish of Albrighton, in the county of Salop, taken this 18th day of June, 1860, before the undersigned, one of Her Majesty's justices of the peace for the county of Salop, who saith, that, on the 13th day of June, 1860, at the parish of Boninghall, in the county of Salop, Thomas Vaughton, of Little Whiston, gentleman, did unlawfully assault, beat, and illtreat him the said Charles Bradshaw; and therefore he prays justice in the premises.

"CHARLES BRADSHAW."

"Sworn before me,
"JAMES LOXDALE."

Mr. Loxdale thereupon issued his summons to the defendant, requiring him to appear at the public office at Shiffnall on the 6th of July last to answer the said information and to be further dealt with according to law. The summons was served on the defendant on the 20th of June last; and on the 3d of July a notice was served on the defendant, of which the following is a copy:—

"To Mr. Thomas Vaughton.

"I hereby give you notice that the summons issued against you on the complaint of Charles Bradshaw is withdrawn, and that you need not attend at the petty *session to be held at Shiffnall on Friday, the [*105
6th of July, 1860. Dated, &c.

"THOMAS BRADSHAW, the father and next friend of Charles Bradshaw."

Charles Bradshaw was a boy of ten years of age, and Thomas Bradshaw, his father, acted for him in the matter. Notwithstanding the said notice, the defendant attended the said petty sessions in obedience to the said summons, with his attorney, and requested that the plaintiff might be called to support his complaint. The plaintiff was called, but did not appear either in person or by attorney (?).

The defendant's attorney then requested the magistrates to grant the defendant a certificate of dismissal under the 9 G. 4, c. 31, ss. 27, 28, on the ground that the offence had not been proved, stating that he believed it was the intention of the plaintiff to bring an action against the defendant for the assault.

The magistrates objected to grant a certificate, on the ground that the case had not been heard: but, at the earnest request of the defendant's attorney, they granted the following certificate, stating the facts, to enable the defendant to raise the question as to the effect of such a certificate, if it should become necessary for him to do so.

"County of Salop } Be it remembered, that, on the 18th day of June,
to wit. } 1860, complaint was made before James Loxdale, Esq., one of Her Majesty's justices of the peace in and for the said county of Salop, by Charles Bradshaw, of the parish of Albrighton, in the county of Salop, for that, on the 13th day of June, 1860, at the parish of Boninghall, in the county of Salop, Thomas Vaughton, of Little Whiston, gentleman, did unlawfully beat, assault, and illtreat the said Charles Bradshaw; and the said *justice thereupon issued [*106
his summons to the said Thomas Vaughton, requiring him to appear before such two or more of Her Majesty's justices of the peace

for the said county of Salop as should be present at the petty sessions to be held at the public office in Shiffnal, in the said county, on Friday the 6th of July, 1860, at eleven o'clock in the forenoon, to answer to the said complaint: and the said summons so issued by the said justice was duly served on the said Thomas Vaughton on the 20th day of June last, requiring him to appear on the day last above mentioned to answer such complaint: And whereas, after the issuing and service of the said summons, to wit, on the 3d day of July, 1860, Thomas Bradshaw, the father of the above named Charles Bradshaw, did cause a notice to be served upon the said Thomas Vaughton, of which the following is a copy [setting it out]: And now at this day, to wit, on the 6th day of July, 1860, the said Thomas Vaughton appeared before us the undersigned justices present at the said petty sessions; but the said Charles Bradshaw, although duly called, did not appear; whereupon the said Thomas Vaughton claimed to have the said complaint dismissed, and we do therefore dismiss the same. Given under our hands and seals this sixth day of July, 1860.

"U. CORBETT.
"GEORGE WHITMORE."

No notice was given by the defendant to the plaintiff of his intention to attend the petty sessions and apply for a certificate; nor was any application made by the plaintiff to the justice to withdraw the summons: but notice was given by the plaintiff to the magistrates' clerk of the said petty sessions that he had withdrawn the summons and given notice to the defendant to that effect.

*107] *In directing the jury, the county court judge told them, that, in his opinion, as a matter of law, the certificate above set out and relied on by the defendant, was no bar to the action; and that, if they thought that the plaintiff had upon the facts proved as to the assault made out a case to their satisfaction for damages, they ought to give him such fair and reasonable damages as they thought fit.

The jury found a verdict for the plaintiff, damages 25*l.*

The question for the opinion of the court upon appeal against this direction was, whether or not the certificate operated as a bar to the plaintiff's right of action, by virtue of the statute. If the court should be of opinion that the said certificate, under the circumstances, above stated, was a bar to the said action, the verdict so given for the plaintiff was to be set aside and judgment entered for the defendant, or a new trial granted.

Scotland, for the appellant.—The 27th section of the 9 G. 4, c. 31, gives the justices summary power to punish persons for common assaults and batteries, and provides, that, "if the the justices, *upon the hearing* of any such case of assault or battery, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred." And s. 28 enacts, "that, if any person against whom any such complaint shall have been preferred for any common assault or battery, shall have obtained such certificate as aforesaid, or, having been convicted, shall have

paid *the whole amount adjudged to be paid under such conviction, or shall have suffered the imprisonment awarded for non- [*108
payment thereof, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same offence." The question is, whether the facts disclosed in this case show such a "hearing" before the justices as to justify them in granting a certificate under the above statute. Those facts are substantially as follows:—Bradshaw took out a summons charging Vaughton with having assaulted him. The summons was returnable on the 6th of July. Vaughton attended before the magistrates to answer the complaint. Bradshaw failed to attend: and the magistrates *dismissed* the complaint, and gave Vaughton a certificate to that effect. Did that amount to such a "hearing" of the complaint as to justify the magistrates in certifying under the statute? It is submitted that it did. When a complaint is made before justices, the party complained against has a right to have the matter heard and determined. The case is virtually disposed of by Tunnicliffe *v.* Tedd, 5 C. B. 553 (E. C. L. R. vol. 57). There, a party having been summoned before two justices, under the 9 G. 4, c. 31, s. 27, for an assault, and having appeared and pleaded not guilty, the complainant declined to proceed, stating that he meant to bring an action. The justices thereupon dismissed the complaint, and gave the defenpant a certificate as follows,—"We deemed the offence not proved, inasmuch as the complainant did not offer any evidence in support of the information, and have accordingly dismissed the said complaint:" and it was held, that what passed before the justices constituted a "hearing" within the meaning of the 27th section, and that the certificate was a complete bar to an action for the same assault under s. 28. It is true that there the prosecutor appeared on the return of the *sum- [*109
mons: but in all other respects, the case is identical with the present, except for the notice of withdrawal, which in reality amounts to nothing. In Tunnicliffe *v.* Tedd, Coltman, J., said,—"It appears to me that the proceeding in this case is analogous to the ordinary case of an indictment. Where a true bill is found by the grand jury, and the defendant appears to take his trial, although no evidence is offered by the prosecutor, that is still a hearing. So here, the complaint having been lodged, and the defendant having appeared and pleaded, I do not see what right the complainant had to withdraw the charge. The defendant had an interest in having the matter disposed of. If the assault were not proved, he was entitled to be acquitted; and, if proved, he would, by the imposition of a fine, or of imprisonment, be relieved from all further responsibility." Maule, J., said,—"The 27th section of the 9 G. 4, c. 31, seems to me to constitute the magistrates a court of oyer and terminer, to hear and determine all matters brought before them. The object of the act was, to put an end to actions and prosecutions for assaults of an ordinary character, by substituting a cheaper and more speedy prosecution, which was to be a bar to all other proceedings, civil as well as criminal, for the same offence. In an ordinary court of oyer and terminer, if the defendant appears and pleads, he has an undoubted right to have the matter determined. When the complaint is ripe for hearing, and the defendant is ready to take his trial, if the prosecutor alleges nothing against him, or merely something that is unsubstantial, then the magistrates are bound to find the charge not

proved, and to give a certificate accordingly. There is no necessity to seek for an analogy in civil proceedings to support the claim of the prosecutor to withdraw at his option. In criminal proceedings, the pro-
*110] secutor, having once put *the law in motion, cannot be allowed to withdraw." And Cresswell, J., said,—It appears to me that there was a *hearing* in this case. As soon as the defendant appeared to the information and pleaded, there was an issue joined, which the magistrates were bound to hear and determine. The complainant being asked what he had to say, told the magistrates that he declined to go any further with the prosecution, as he meant to bring an action. The magistrates having heard all the man had to say, dismissed the complaint. The defendant was clearly entitled to have the benefit of that state of things." Then did the notice of the prosecutor's intention to withdraw from the prosecution make any difference? The complainant having sworn an information, a summons was duly issued and served on the defendant requiring him to appear at the petty sessions on the 6th of July. Between the time of service and the return day of the summons, viz. on the 3d of July, a notice was given to the defendant, —not by the complainant, but by the complainant's father,—that the summons was withdrawn, and that he need not attend. The defendant was perfectly justified in disregarding that notice: the complainant had no power to withdraw from the prosecution, and the defendant had the right to have the matter properly disposed of. To constitute a "hearing," it is not necessary that any evidence should be given. [BYLES, J.—You would say that the unheard summons is like an unfound bill of indictment. The state of things existing here is precisely the same as if the complainant had simply abstained from attending at the return of the summons.] Precisely so. The granting of the certificate is not a judicial act; and a mandamus would lie to compel the magistrates to grant it: The Queen *v.* Robinson, 12 Ad. & E. 672 (E. C. L. R. vol.
*111] 40); 4 Per. & D. 321. In Hancock *v.* Somers, 5 Jurist, *N. S. 983,—where a question arose as to the time at which the certificate should be given, Lord Campbell says: "The question depends upon whether it is discretionary with the magistrate to grant or to withhold the certificate. If it is discretionary, the magistrate ought 'forthwith' to exercise his discretion, because it is in the nature of a judicial act, which should be done immediately, and in the presence of the opposite party. But I am of opinion that it is not discretionary. The policy of the legislature in constituting this new tribunal appears to have been, that if a person were once exposed to peril in respect of an act done by him, he should be exempted from further proceedings, civil or criminal, for the same cause. In this case the magistrate took cognisance of the evidence, and must be taken to have adjudged that the complaint was frivolous, and therefore he was bound to grant his certificate for the protection of the party. He did grant his certificate, and I think he granted it 'forthwith.' I think that the section means that the party has 'forthwith' a right to demand the certificate. This is not like the granting of a certificate for a special jury, which is a judicial act, and must be done immediately at the close of the trial. *This is a ministerial act*, and, after judgment dismissing the complaint, the certificate is in the nature of a record of the judgment which the magistrate has pronounced. The defendant de jure was entitled to demand and to

have the certificate; and it is immaterial whether the prosecutor was present or not when it was made out." And Crompton, J., said: "The granting of the certificate is not discretionary, because I do not see upon what the magistrate has to exercise his discretion after he has come to the decision that the complaint is within one of the three cases mentioned in s. 27. The granting of the certificate is *imperative upon him." A similar opinion is expressed in Costar *v.* Hetherington, 5 Jurist, N. S. 985, where Erle, J., said: "When the complaint is dismissed on either of the three grounds mentioned in s. 27, the magistrate is bound to give his certificate as a protection to the accused party. The certificate is demandable from the magistrate ex debito justitiæ." Since Jervis's act, 11 & 12 Vict. c. 43, these proceedings assume a more formal character: parties may be heard by counsel; and by s. 18 express power is given to the magistrates to award costs. [ERLE, C. J.—In the case of an order of removal, it required an act of parliament to enable the justices to award costs to the respondent on the abandonment of the appeal.] There, the court of quarter sessions had no seisin of the appeal: the notice of appeal would not appear until the first day of the session. Here, a complaint was formally made and entered, and a summons issued. [KEATING, J.—The question is whether the right to the certificate is not confined to a case where the accused has been in peril of being convicted at the hearing?] The language of the statute, it is submitted, is not so limited. [*112

Phipson, contrà.—It is impossible to read the statute without seeing that the power to certify exists only where there has been a hearing. By the 27th section, the magistrates are to hear and determine; and their determination is to be final. It cannot be said that there has been a hearing, when there is no issue joined, and no complainant present to support any charge. To hold that the certificate here is valid would be opposed to all the reasoning upon which the decision in Tunnicliffe *v.* Tedd is founded. The defendant there appeared and pleaded not guilty; and the complainant also appeared, but declined to proceed with his complaint. It did not, therefore, lie in his mouth to say *that there had been no hearing. The judgment of Cresswell, J., puts the decision upon its true ground. "As soon," says that learned judge, "as the defendant appeared to the information, and pleaded, there was an issue joined, which the magistrates were bound to hear and determine. The complainant being asked what he had to say, told the magistrates that he declined to go any further with the prosecution, as he meant to bring an action. The magistrates, *having heard all the man had to say*, dismissed the complaint. The defendant was clearly entitled to have the benefit of that state of things." That goes quite as far as a case ought to go. The 18th section of Jervis's act has nothing to do with the question. That applies to a case where the complaint is dismissed on a hearing under section 13 or 14. It is contrary to the plain and obvious meaning of the act to hold that there has been a hearing unless the parties appear and are ready to be heard. [BYLES, J.—May not the word "hearing" in the 27th section of the 9 G. 4, c. 31, mean "time and place of hearing?"] It is submitted not. [*113

Scotland, in reply.—There is substantially no distinction between this case and Tunnicliffe *v.* Tedd. [BYLES, J.—In The Queen *v.* Stamper,

1 Q. B. 119 (E. C. L. R. vol. 41), 4 P. & D. 539, by a rule of quarter sessions it was ordered that all applications intended to be made for orders of maintenance in bastardy, should be entered with the clerk of the peace on or before a certain day, and that such applications should be called on at the sessions in the order of entry. The overseers of a parish entered an application with the clerk of the peace, according to the above rule and the practice of the sessions, paying the usual fee on entry, and giving notice to the party against whom they applied. At the sessions the party attended, and the case was called on; but the *114] *prosecutors did not appear. The sessions made no order upon the application, and ordered (under the statute 4 & 5 W. 4, c. 76, s. 73) that the overseers should pay costs to the party appearing: and it was held, that the entry was an *application*, and the calling on of the case, and attendance of the opposite party, a *hearing* of such application, within s. 73; and therefore that the order for costs was rightly made.] So, here, the information and the attendance of the appellant in answer to the summons amounted to an application and a hearing within this statute. The notice of withdrawal of the complaint makes no difference. [BYLES, J.—Suppose the complainant had gone on to say, "I withdraw the charge because I am conscious that I have no ground of complaint?"] That is in substance what he does. [BYLES, J.—We now know his motive.] If, instead of being a mere assault, the charge had been one of a grievous character,—could the complainant by acting as he did here keep it hanging over the defendant's head for an indefinite time? Once made, whatever the charge, the accused has a right to have it disposed of.

ERLE, C. J.—The argument of Mr. *Scotland* has shaken the opinion I was disposed to form, but has not convinced me. The court will take a little time for deliberation. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court:(*a*)

The material facts on this appeal are, that the plaintiff laid an information for an assault under the 9 G. 4, c. 31, s. 27, and took out a summons, which *was served on the defendant, and that he afterwards, and before the day for hearing, by his agent, gave notice *115] both to the defendant not to attend, and to the magistrates' clerk that he should not attend; that, on the day, the defendant attended and claimed to have the information dismissed, and a certificate of dismissal granted, although the plaintiff was absent; and that the magistrates granted a certificate showing these facts: and the question is whether such certificate bars this action.

The statute authorizes the magistrates to give the certificate, if *on the hearing* they deem the charge not proved: and at first it seemed difficult to say that they had heard the matter at all. But we were pressed with the case of Tunnicliffe *v.* Tedd, 5 C. B. 553 (E. C. L. R. vol. 57), where the court lay down as principles, that the information is the commencement of a criminal proceeding, analogous to an indictment; that the summons is the act of the magistrates on behalf of the public; that the party who begins a criminal proceeding cannot withdraw from it leaving it pending, but, on the contrary, that the party charged has a right to force it on to a conclusion; and that, if, at the time for concluding the

(*a*) The case was argued before Erle, C. J., Byles, J., and Keating, J.

case, the informant offers no evidence in support of his charge, it ought to be dismissed, and such dismissal is a "hearing."

In that case, the informant attended at the return of the summons; and, when it was called on, the defendant pleaded not guilty, and was ready with his witnesses, and then the informant said he should withdraw from the case, and bring an action; and thereupon the magistrates chose to certify. In the argument of that case, it is said that the hearing begins when a plea is pleaded and issue is joined: and we have had to consider whether we could distinguish the present case, on the ground that the informant did *not attend, and that a formal plea was [*116 not taken, and so no issue joined.

After consideration, it appears to us that the principles of the judgment above mentioned do not authorize us to rely on this distinction. It is held that the informant cannot withdraw, and that the defendant has a right to a decision, and that, if the informant says he withdraws, the case is heard, and the information is dismissed, and the power to certify is given, if the magistrates in their discretion choose to exercise it.

Here, although the informant was not present to express orally that he withdrew, his writing was to that effect; and, if he absented himself with the intention of withdrawing, his act ought to leave to the defendant all the rights which arise on withdrawing the charge. In The Queen *v.* Stamper, 1 Q. B. 112 (E. C. L. R. vol. 41), 4 P. & D. 539, it was decided, under the bastardy act then in force (4 & 5 W. 4, c. 76, s. 73), that an application duly entered with the clerk of the court entitled the putative father, when the case was called on, to claim a dismissal, and that such a dismissal was a hearing entitling him to costs, although the applicant did not attend to support his application.

As the certificate was granted, we feel bound by these cases to hold that it barred the action; and consequently our judgment is for the appellant. Judgment for the appellant.

*RALSTON *v.* SMITH. *Nov.* 26. [*117

The use of a roller and a bowl for calendering woven fabrics, and the means of regulating the relative speed of their motion, were well known. In the process of calendering, the roller was smooth and the speed of the roller and the bowl was unequal: in embossing the roller was patterned, and the speed of the roller and the bowl was equal.

The plaintiff took out a patent for a combination of the patterned roller with unequal speeds of the roller and the bowl:—Held, that the alleged invention was void for want of novelty and utility.

The plaintiff, having found that one description of roller only would answer, entered a disclaimer; and, by his amended specification, confined his claim to one kind of substance for the roller, viz., a hard metal, and one kind of pattern for engraving thereon, viz., circular grooves round the roller:—Held, that this was practically a claim for a new invention, and not a part of any invention comprised in the original specification.

THIS was an action for the infringement of a patent.

The declaration alleged the grant of letters patent to the plaintiff for his invention intituled "Improvements in embossing and finishing woven fabrics, and in the machinery or apparatus employed therein," the filing of a specification of the invention, and of a disclaimer and memorandum of alteration by which the words "and in the machinery or apparatus employed therein" were disclaimed, and certain parts of the specification

were also disclaimed and altered; and the declaration then alleged an infringement of the patent by the defendant subsequent to the filing of the disclaimer.

The defendant pleaded,—first, not guilty,—secondly, that the plaintiff was not the true and first inventor,—thirdly, that the invention not disclaimed was not new,—fourthly, a traverse of the specification of the invention as alleged in the declaration,—fifthly, that the disclaimer extended the exclusive right granted by the patent,—sixthly, that the privilege granted by the patent was not a privilege of working or making any manner of manufacture. Issue thereon.

The cause was tried before Erle, C. J., at the sittings at Westminster after last Trinity Term. The plaintiff gave in evidence sealed and certified copies of his specification and disclaimer. The specification was as follows:

*118] "Specification in pursuance of the conditions of the *letters patent, filed by Walter Ralston in the great seal patent office on the 21st of May, 1859.

"To all to whom these presents shall come, I, Walter Ralston, of the city of Manchester, in the county of Lancaster, engraver to calico printers, send greeting:

"Whereas, Her most excellent Majesty Queen Victoria, by Her letters patent, bearing date the 23d of November, 1858, in the 22d year of Her reign, did, for Herself, Her heirs and successors, give and grant unto me the said Walter Ralston Her special license that I the said Walter Ralston, my executors, administrators, and assigns, or such others as I the said Walter Ralston, my executors, administrators, and assigns, should at any time agree with, and no others, from time to time, and at all times thereafter during the term therein expressed, should and lawfully might make, use, exercise, and vend within the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man, an invention for 'Improvements in embossing and finishing woven fabrics, and in the machinery or apparatus employed therein,' upon the condition (amongst others) that I the said Walter Ralston, by an instrument in writing under my hand and seal, should particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, and cause the same to be filed in the great seal patent office within six calendar months next and immediately after the date of the said letters patent.

"Now know ye that I the said Walter Ralston do hereby declare the nature of my said invention, and the manner in which the same is to be performed, to be particularly described and ascertained in and by the following statement (that is to say):—

*119] "I employ a roller of metal, wood, or other suitable *material, and groove, flute, engrave, mill, or otherwise indent upon it any desired design, and cause it to revolve with a bowl or bowls of paper or other substance, and, by means of gearing well known to mechanics, I give the circumference of the pattern roller a quicker motion than the circumference of one of the bowls, so as to obtain a frictional action upon the surface of the fabric as well as pressure, so that if the fabric is moved transversely when fed to the machine, an indefinite number of watering patterns may be given to the fabric at one operation or passage: but, if two operations be given, moirè antique or other varieties may be

obtained, which can be still further varied as desired according to the number of times the fabric is allowed to pass through the machine.

"In addition to the variety of the pattern, a bright finish or lustre is given to the fabric by means of the friction or rubbing action of the two surfaces of the roller and the bowl.

"I may also obtain the same result by reversing the arrangement, and causing the circumference of the bowl to move quicker than the circumference of the roller, so as to obtain a similar frictional or rubbing action, the gearing being simply required to be adapted for the purpose.

"It is well known, that, for calendering purposes, plain or polished rollers have necessarily been driven at a greater speed than the bowl or bowls; but hitherto it has not been considered practicable to give pattern rollers the same relative movement.

"Having thus fully described the nature of my said invention and the manner in which the same is to be performed, I desire it to be distinctly understood that I do not confine myself to the precise details herein set forth, as such may be varied or modified without departing from the principle thereof: but I claim as *my invention, and which to the best of my knowledge and belief has not been [*120 hitherto used within the realm, the employment of the grooved, fluted, engraved, milled, or otherwise indented rollers of metal, wood, or other suitable material driven at a greater speed than the bowl or bowls connected with them, so as to exert a rubbing or friction upon the fabric submitted to their action, and thereby produce an indefinite variety of pattern as well as a bright finish or lustre, and also reversing the operation by giving the bowl a quicker motion than the pattern roller. In witness," &c.

The disclaimer and memorandum of alteration was as follows:—

"To all to whom these presents shall come, I, Walter Ralston, of the city of Manchester, in the county of Lancaster, engraver to calico printers, send greeting:

"Whereas, Her Majesty Queen Victoria, by Her letters patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date the 23d of November, 1858, granted unto me the said Walter Ralston the sole privilege to make, use, exercise, and vend my invention therein intituled 'Improvements in embossing and finishing woven fabrics, and in the machinery or apparatus employed therein,' (and which title is intended to be hereby altered by the disclaimer hereinafter contained, so as to be in these words,—'Improvements in embossing and finishing woven fabrics,') within the said United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, during the term of fourteen years thence next ensuing, upon the condition (amongst others) that I the said Walter Ralston should by an instrument in writing under my hand and seal particularly describe and ascertain the nature of my said invention and in what manner the same is to be performed, and *cause the same instrument to be filed in the great seal patent office within six calendar months next after the [*121 date of the said letters patent: And whereas, in pursuance of the said condition, I did by a specification under my hand and seal, bearing date the 19th day of May, 1859, particularly describe and ascertain the nature of my said invention and in what manner it is to be performed, and did cause the same specification to be filed in the said great seal

patent office within the time and in manner prescribed by the said condition and letters patent: And whereas, since the filing of the said specification, I have been advised that part of the said title contained in the said letters patent as aforesaid is not properly speaking applicable to my said invention as described in my said specification, and I am therefore desirous of disclaiming so much of the said title as hereinafter expressed; and I have also been advised that some of the descriptions of rollers mentioned in my said specification cannot be conveniently applied in performing my invention, and I am therefore desirous of disclaiming the use of such rollers, and I have found that the production of watering patterns upon a fabric cannot be effectually produced in a single operation by all descriptions of rollers, but only by those rollers which have grooves, flutings, or indentations around their surfaces as numerous as the warp threads of the fabric to be operated upon, or nearly so, and I am therefore desirous of limiting my claim with respect to such watering patterns, and correcting certain inaccuracies in the description contained in the specification in some slight particulars, by the disclaimer and memorandum of alteration hereinafter expressed or contained.

"Now, know ye, that, by and with the license and consent of Her said Majesty's solicitor-general, and for the reasons aforesaid, I do here-
*122] by disclaim the latter *portion of the words of the said title of the said invention contained in the said letters patent, which consists of these words—'and in the machinery or apparatus employed therein,' so that the said title shall henceforth be in these words—'Improvements in embossing and finishing woven fabrics:' And by and with the leave aforesaid, and for the reasons aforesaid, I the said Walter Ralston do hereby disclaim the use of any pattern rollers in performing my invention *except those which are made of metal or other suitable material, and have circular grooves, flutes, or indentations made around their surfaces;* and I also disclaim the use of any other description of design upon the surface of such rollers, *except such circular grooves, flutings, or indentations as aforesaid:* And I also disclaim the production of watering patterns upon a fabric at one operation or passage of it between a pattern roller and a bowl, against which it works, except when the grooves, flutes, or indentations around the surface of such roller are as numerous as the warp threads in the fabric to be operated upon, or nearly so: And I disclaim all parts of the description of my said invention contained in my said specification which are not contained in the said description as hereby altered; and I hereby alter such description, and that the same shall henceforth describe the undisclaimed parts of the said invention in these words, that is to say,—'I employ a roller of hard metal or other suitable material, and make grooves, flutes, or indentations around it, and cause it to revolve with a bowl or bowls of paper or other suitable substance, and, by means of gearing well known to mechanics, I give the circumference of the pattern roller a quicker motion than the circumference of one of the bowls, so as to obtain a frictional action upon the surface of the fabric as well
*123] as pressure.' If the grooves, flutes, or indentations *around the roller are as numerous as the warp threads in the fabric to be operated upon, or nearly so, or if the fabric has already passed through between the roller and the bowl, and the fabric has slight transverse

motions given to it when fed into the machine, an indefinite number of watering patterns may be given to the fabric at one operation or passage. If further operations be given, varying the extent of the transverse motions, moiré antique or other varieties may be obtained, which can be further varied as desired, according to the number of times the fabric is allowed to pass through the machine. In addition to the variety of the patterns, a bright finish or lustre is given to the fabric by means of the friction or rubbing action of the surface of the roller. I may also obtain the same result by reversing the arrangement, and causing the circumference of the bowl to move quicker than the circumference of the roller, so as to obtain a similar friction or rubbing action, by rubbing the surface of the fabric against the roller, the gearing being simply required to be adapted for the purpose. It is well known, that, for calendering purposes, plain or polished rollers have necessarily been driven at a greater speed than the bowl or bowls, but hitherto it has not been considered practicable to give pattern rollers the same relative movement, so as to obtain any beneficial result.

"Having thus fully described the nature of my said invention, and the manner in which the same is to be performed, I desire it to be distinctly understood that I claim as my invention, and which to the best of my knowledge and belief has not been hitherto used within the realm, the employment of grooved, fluted, or indented rollers of hard metal or other suitable material driven at a greater speed than the bowl or bowls connected with them, so as to exert a rubbing or *friction upon the fabric submitted to their action, and thereby produce an [*124 indefinite variety of pattern as well as a bright finish or lustre, and also reversing the operation by giving the bowl a quicker motion than the pattern roller.

"And I the said Walter Ralston do further declare that the above-written disclaimer and memorandum of alteration are not, nor is either of them, nor are any parts thereof, respectively, intended to extend the exclusive right granted by the said letters patent, and that these presents shall not extend the said exclusive right in any way whatsoever."

The plaintiff, who was examined as a witness, in his examination in chief, stated in substance as follows:—I am an engineer and calico-printer, and have been so for thirty years. I have had great experience in the different processes used in finishing cloths, and in the machinery used for that purpose. Before my patent there was a process known which is called calendering. That process was carried into effect by a pair of rollers, or a roller and a bowl, as it is called,—the cloth passing between the two. The roller and the bowl moved at different surface speeds, for glazing purposes only; that is, when there was gloss to be produced on the surface of the cloth, there was a different surface speed. When there was different surface speed, the surface of the roller rubbed or produced a sort of frictional effect upon the surface of the cloth. In addition to this calendering process, there were other processes for finishing cloth for embossing, such as produced watery appearances. For the production of this embossing, a roller and bowl were used, and the roller was engraved. *These bowls were well known things*, made of paper, and made very hard by pressure, not lapped round, but put together in such a way that the edges of the paper were at the outside of the roller.

*125] *In this embossing, there was a roller and a bowl used; the roller turned the bowl without any gearing: the surface speed of the one was the same as the other: there was no gearing to communicate the motion from the one to the other for embossing. For calendering, when you wanted to produce a glossy effect, there was gearing for the purpose of communicating motion from one roller to the other: the gearing was an apparatus of a well-known description, and the relative motions of the roller and the bowl could be varied by alterations in the gearing, that is to say, by altering the relative sizes of the wheels and the numbers of of their teeth. I had been employed as an engraver in engraving rollers for calico-printers and embossers; and it happened to me at one time, that, after sending a person an engraved roller, some complaint was made to me about the effect of it in embossing; and the nature of the objection or complaint which was made to the action of the embossing roller was, I believe, the first time, that I had set it too sharp, and that it cut the cloth: the roller then came back to be altered; I made the fluting shallower, I mean that I made the projections on the surface of the roller shallower; they were too deep. I sent the roller back when I had altered it. After I had made this alteration, and had sent it back, the purchaser of the roller came to me again and also sent the roller back, stating that it had lost its lustre. By losing its lustre, I mean that the projecting lines were too flat upon the surface. In embossing in this way, the cloths are in the first place calendered before they are embossed,—in some instances, but not always. If you want a gloss upon the cloth, you calender before you emboss,—in order to have a high gloss upon the cloth, you must calender before you emboss. I have told you of the roller which had been brought back to me. That

*126] induced *me to make experiments. I altered it a third time, and I put some cloth in it before it went to the roller again and the engraving-machine. Then, when I put the cloth in, in going through the regular calendering process, I made a slip with one of my hands while the roller was in motion. I made a sudden slip, and I very nearly cut my hand. By this means, when I took the bit out, it had a peculiar effect. I looked at it, and I tried it no further then. The effect was not so good as I could get now. I tried another bit, about three inches, and it was more regular, but I could not get it as regular as gearing by wheels would have done it. When I saw the effect, I immediately got a small model machine, which is now here. It was in that way that I was led to make this invention or discovery. I had never seen or heard of anything of this sort before. In this way of operating upon the cloth which I have spoken of, I did not produce watered patterns in the first bit; but I soon did get the watery effect, by a change of cloth: and I did various sorts of cloth. I ultimately produced the watery effects such as have been seen here to-day, and upon cloths of the same description. After I had made this discovery, I proceeded to make a machine, and to put it in operation. I had my sons to assist me. I did this secretly, to avoid exposing it. I did it in an attic, not in the workshop,—in a small room by itself. When I got the machine completed and set it to work, it enabled me to produce such watery effects as have been seen here to-day. Directly after this I took out my patent. In performing my invention, if a slight lateral motion be given to the cloth as it goes into the machine, that produces the watery effect: if a

larger extent of motion laterally be given, that produces the moiré antique: the chief difference between the two patterns is in the size of the pattern. *In producing these patterns, there is an endless variety: the same is never obtained again. [*127 *In working with the roller and the bowl according to my invention, I give the roller a greater surface speed than the bowl:* that enables me to produce the glossiness upon the surface of the cloth, and at the same time to produce the pattern which I have spoken of. Some time after I had filed my specification, I found that there were some descriptions of patterns upon rollers which could not be used in this way; and I put in a disclaimer. There were some descriptions of wooden rollers which would not do, and therefore I confined my claim to metal only. In performing my invention with my roller, I have in the pattern roller made circular indentations round: longitudinal indentations will not do. Soon after the date of my patent, I brought my invention into practice. I have finished large quantities of cloth according to this invention; and I have granted licenses for the use of my invention. The passing of the cloth between the roller and the bowl in the way I have described, together with the lateral motion which I have spoken of, produces the effects which are seen upon cloths now in court.

On cross-examination, the plaintiff said,—At the time I first made these experiments, the first model was made by myself and my son. That had circular grooves. The flutes were complete circles round the cylinder, in endless lines: that is what I mean by circular. When I say an endless line, I mean that each circle is complete in itself,—separate rings; not spiral. I varied the lines to suit the cloth. I made no roller but with circular lines, or what I term endless lines,—separate circles. Up to the time of filing my specification, I had used other than circular grooves or ringed grooves for embossing; but, for the purpose of my patent, I had not used anything else but circular *grooves up to the time of my specification. [*128 Speaking of the experiments up to time of the first specification, the only description of grooves which I used, were, circular grooves or separate rings, with differences in the width of the grooves. I made these rings myself. They were done by what we term milling. I made some by what we call engraving,—still the same circular groove. There is no new machinery used in giving this difference of surface velocity to what was known before. Circular grooves were used before for embossing: they were used in the process of passing cloth between the rollers. *There is nothing new in circular grooves themselves.* I do not know that I had observed that they were used in varying ratios to the number of warps in the material: they might have been used in varying proportions; but I never did but two. The first that I used was much the same sort of thing as had been used before in proportion to the number of grooves. The giving a slight lateral motion to produce a slight lateral effect, was a thing that had been done and was well known before in creeling cloths, as they passed through the machine, giving them a slight transverse motion: and that gave what is called the watered surface. The moiré antique was never done before upon cotton, but upon silks. I do not know whether it was done upon silk and cotton mixed fabrics. It was done upon two silks together. Articles such as this [a piece of black cloth shown to witness] were produced before my patent, upon this

fabric of silk and cotton. Moiré antique was done before my patent, but was not done by giving transverse motion. Water calendering, or creeling, is confined to watering produced upon two cloths put together face to face. What I call watering, is done by the transverse motion; and moiré antique is done by pressing two cloths *together. A greater surface speed had been given before in calendering, for the purpose of producing a glazing effect. In my invention, there must be a greater ratio of speed between the roller and the bowl,—in any ratio; so that, if the one revolved ten or twenty times as fast as the other, that would do: the speed is immaterial. If I want a greater brilliancy, of course I drive it quicker, without any limitation at all,—so that you would whirl one round rapidly while the other would be scarcely going at all, by a change of the gearing. There are no limits to the degree of velocity or to the degree of slowness. I was told that some description of rollers would not do, on consulting my son and other mechanical men. The person who makes my machinery is named Edmiston. He was not the person who told me that other patterns would not do. Some descriptions of rollers mentioned in my specification would not succeed in the material. The patent included wood. I disclaimed it, and confined it to metal. I do not know that anybody informed me that I should limit my invention to rollers with circular grooves, and that other patterns would not do. Nobody informed me: I discovered that myself. It was about the middle of June when I first made the discovery I have done with circular rollers. When the bowls, as they are called,—the paper bowls,—had been used for some time, they would naturally get smaller under the pressure used; and, when that was the case, their surface velocity would be altered necessarily. It would not be of any detriment for twelve months' wear; in two or three years, the effect of the wearing of the paper bowls would be imperceptible to produce a difference in the surface velocity with a machine which had originally the same surface velocity. It would be imperceptible for some time; but in the course of time, it would ultimately become perceptible.

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*No material besides metal will beneficially answer the purposes of the roller for what I call my invention. Wood has an imperfect action, and is too soft, and less profitable than a metal roller. It is possible, but not very probable, that nothing but metal will do, in fact. There is wood which would do, but it would not pay anybody to use it. I should say that nothing but metal would do: other things than paper will do for the bowls; wood will do for the bowls: when they are made of paper, they are made of solid paper, like papier maché. Other things would do for the purpose of my invention besides paper and wood for the bowls: leather would do. There are many substances that would not do; but glass would do.

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On re-examination, the plaintiff said,—This [produced] was the model that I used when I first carried out my invention. Before I had this model, I never knew any process of glazing and the process of embossing carried on by one instrument at the same time. Before that, there were two different machines. Before I took out my patent, I had seen longitudinal indents upon a metal roller. I was acquainted with spiral, longitudinal, and other varieties of indentation before my patent. My experiments were all rings round the cylinder,—circular rings. I knew of them; but I only experimented with rings in the circular. I had for-

merly seen the longitudinal indent as well as the circular on rollers; but I experimented upon the circular indentations, and that was the first time I ever saw it or heard tell of anything of the sort being done. My original specification was not limited to the circular, but would have taken in any. When I was asked the question "When I by my disclaimer had limited it to circular, who had told me that none but circular would do?" I did not understand the question. I did not understand the line not being round; because *I knew that. I thought it right to limit my specification to circular. Supposing the line [*131 of indentations to be longitudinal instead of circular, they would have a tendency to cut the cloth: it would tear the cloth asunder, if used in this combined operation. When I said, in my examination in chief, that, while working upon a roller which had been sent back to me, I made a sudden slip, I did not see the roller slip, but it was in the process of engraving that I tried it, when it slipped with me; and that was the cause of my finding it out. I did not know the effect of giving transverse motion, until I found it out in the way I have described. I had never known it before in the single operation. I had never known that effect before produced by a single operation,—both calendering and embossing: they were never done by one operation before. The transverse motion had been used in what we call the process of creeling before my invention. That process is, calendering two pieces together. This [exhibiting it] is a piece which has been so calendered. By creeling, I mean putting two pieces of cloth with their faces together, and then passing them without friction through between the common calendering rollers. I had known transverse motions given in passing two pieces together through between the rollers in this way. I say that I have known it done in this way, when the metal roller went at the same velocity as the bowl: but I have never known it applied when the velocity was different. Creeling is pressing two pieces of cloth together: it is what they call the creel finish. A piece of cloth which has been put into my hand, is what is called moiré antique. That was not finished with the creel finish. Moiré antique is what we call a kind of map upon the cloth; but watering is finer; it is more like the grain of wood. This [a specimen of cloth produced] is not made of *silk: it is a combination. I suppose there is a portion of silk in [*132 it; but I do not exactly know how it is made.

Mr. Charles May, civil engineer, deposed as follows:—My attention has been called to a great many branches of international industry. I have a general notion of the mode adopted of calendering cloth. I have seen calendering done forty years ago. I have a general notion of the mode adopted to give the water pattern to it after it has been calendered. I think I ought to explain that the watering of fabrics, say of corded silk, any two woven fabrics which are woven with a cord on the surface, if they are put together face to face and pressed with great force, they produce a slight watered appearance, simply by pressure. The plain calendering is by friction generally between a metal and a paper bowl; the technical term of a roller made of paper is "bowl;" and that friction is made by two rollers going with a different motion, that is, the surface velocities are different. I have read the plaintiff's specification and disclaimer. Before that time I was not acquainted with any mode by which calendering and the imparting the water pattern

by pressure were done by one and the same operation. Indent or embossing is by no means a water pattern. The prominent part of the invention described in the specification is calendering and embossing by the employment of grooved rollers of hard metal driven at a greater speed than the bowls, so as to exert a friction upon the fabric submitted to their action, and thereby produce variety of pattern as well as finish or lustre,—not water pattern merely, but any pattern and lustre. I produce a piece which I myself saw put through between the rollers of this machine once with a little transverse motion, and in it the lustre and the water pattern were produced at the same moment: the trans-
*133] verse motions give the *water pattern; the machine gives it lustre, by the friction of the roller. Calendering and embossing in one process was at the date of the patent new and important; and I believe the particular effect produced to have been not only new, but of great commercial importance. I saw the defendant's machine; but I could not say from its appearance only whether it had a spiral groove or not. The defendant's roller had the grooves cut spirally around it; but whether it had a single-threaded screw, as we term it, or a double, or treble, or quadruple, I cannot say precisely, the grooves are so exceedingly fine. I took an impression of them, and counted them; and I think there are sixty-eight turns in the spiral to one inch in length, so that it requires a tolerable eye to discern them; and indeed my eye unassisted will not discern them. I should say the warps on the roller corresponded with the warps on the cloth; that is to say, there are many cloths with sixty-eight warps to an inch. The plaintiff uses a variety of rollers. The plaintiff in his rollers had some of 64, some of 68, and some of 72 grooves in an inch of the length of the cylinder upon which they were cut; the object being, to get a very close approach to the number of the warp threads of the fabric to be impressed, the number of rings varying, with the object of meeting the varying number of warp threads in an inch of cloth. It is stated distinctly in the specification that the number of grooves should very nearly correspond with the number of warp threads in the fabric. I will not be bound to a single turn or two in the spiral grooves upon the defendant's roller: the number I have mentioned is as near as I could take it from an impression. I quite believe that the plaintiff's invention is new and very important. There is no substantial difference in principle between the plaintiff's and the defendant's machine. I think there is such a differ-
*134] ence in the mode of carrying out *that principle, that, while the plaintiff's machine I believe to be a perfectly successful one, I think that the defendant's machine will only do inferior work, and that by reason of the mode of carrying out the mechanical adaptation of the thing. Differential motion between the roller and the bowl is common to both machines. I found in the plaintiff's machine that the surface motion between the roller and the bowl was as 10 to 18, that is, while the surface of the roller passes over 18 inches, the bowl surface passes over 10 inches. In the defendant's machine there was a motion of 10 inches of the bowl to 11½ inches in the roller. The one was 10 to 18, the other was 10 to 11½; consequently, the defendant's would not give so high a glaze, apart from the mere mechanical differences which have been pointed out between the plaintiff's machine and the defendant's.

The defendant's produced the combined glazing and embossing in the same way as the plaintiff's.

On cross-examination, Mr. May stated as follows:—There would be a great difference between the result produced by a single and by a double spiral [groove] upon the roller. The mechanical arrangement of the defendant's machine is the old calendering machine; but the roller in that was not grooved. I judge from reason, that, if these spirals were formed in one thread they would produce a different result than if they were formed in several threads. You may make it in spirals of 20 or 30. I think it is probable that each would produce a different result. If a spiral as fine as that in the defendant's roller is used, the difference between that and the plaintiff's would hardly be perceptible; but it would be against the spiral. The spiral and the circular must produce a different result: but I think that between a single spiral and the circular groove the difference would be *almost imperceptible. No doubt, there would be a difference between the [*135 result produced by the spiral and that produced by a circle; but the difference would, I believe, be almost imperceptible.

On the part of the defendant, it was objected,—first, that the plaintiff's invention was a mere application of old processes, and not the subject of a patent,—secondly, that the plaintiff's original specification did not describe any invention; and that the process which it describes was impracticable also,—thirdly, that the plaintiff had not at the date of his first specification invented what he now claims as his invention,—fourthly, that the disclaimer was void, on the ground that it departs from the specification, and also on the ground that it states that the rollers may be made of metal or any other suitable material, without giving any criterion of suitability,—fifthly, that the claim contained in the specification as altered by the disclaimer, is as extensive as the claim contained in the specification originally, and that the claim is too large, and bad,—sixthly, that the specification as altered does not state whether the production of watering patterns is claimed,—seventhly, that the disclaimer has confined the claim to the use of rollers with rings; and, as the defendant has used spirals only, he has not infringed.

The Lord Chief Justice reserved leave to the defendant to move to enter a verdict for him upon each of the objections above stated: and the jury found a verdict for the plaintiff, subject to the leave so reserved.

Grove, Q. C., on a former day in this term, obtained a rule nisi accordingly, on the grounds,—"that the alleged invention is not the subject of a patent,—that it is a mere application,—that the plaintiff claims for a principle alone,—that he had not invented what he [*136 *represented himself to have invented,—that the specification with or without the disclaimer gives no sufficient means of performing the invention, and misleads the public, in not stating what the plaintiff really had invented,—that the disclaimer discloses a different invention from the original specification,—that the disclaimer extends the exclusive right granted by the letters patent,—that the claim in the disclaimer is too large, ambiguous, and vague,—that the defendant has not infringed as alleged in the declaration." The cases of Brook *v.* Aston, 8 Ellis & B. 479 (E. C. L. R. vol. 92), Seed *v.* Higgins, 8 Ellis & B. 755, and Higgins *v.* Seed, 8 Ellis & B. 771, were cited.

Knowles, Q. C., and *Hindmarch*, on a subsequent day showed cause.—The object of the plaintiff's patent was to effect the performance of the two operations of calendering and embossing by one process,—by means of an engraved roller to which a more rapid motion was given than to the bowl. Ever since the case of Crane *v.* Price, 5 Scott N. R. 338, 4 M. & G. 580 (E. C. L. R. vol. 43), 1 Webster's P. C. 409, it is conceded that any process by which a new result is arrived at by an expenditure of less time and money than it had before been arrived at by two separate processes, may be the subject of a patent. In Booth *v.* Kennard, 1 Hurlst. & N. 527,† vegetable gas had been obtained from oils which were separated from seeds and other oleaginous substances by pressure: it was discovered that gas might be distilled at once from the seeds, &c., without first separating the oil: and it was held, that, assuming the invention to be new, it was such as might be the subject of a patent. Cockburn, C. J., in giving the judgment of the Exchequer Chamber, says: "The patent claims the making gas directly from seeds and other oleaginous substances instead of making it from oils. By this means the patentee gets rid of one of two processes. Pre-
*137] viously *to the date of the patent, gas had been obtained by a particular apparatus from oils which were first separated from the substances containing them, by pressure. The patentee has discovered that the first process may be dispensed with. That is a useful invention, and the patent is sustainable if the invention is new." In Newall and Elliott *v.* Glass, 4 C. B. N. S. 269 (E. C. L. R. vol. 93), A. was the inventor of "improvements in apparatus employed in laying down submarine electric telegraph wires." In the provisional specification filed pursuant to the 6th section of the 15 & 16 Vict. c. 83, the invention was thus described,—"The cable or rope containing the insulated wire or wires is passed round a cone, so that a cable in being drawn off the coil is prevented from kinking by means of the cone, and there is a cylinder on the outside which prevents the coil from shifting in its place." In the complete specification, after describing the invention in the same terms, the inventor proceeded to say,—"When the wire or cable is to be laid down, I place over the cone an apex or top which is conoidal or conical, and *around this I suspend several rings of iron or other metal by means of cords, so as to admit of adjustment at various heights over the cone. The use of these rings is, to prevent the bight of the rope from flying out when going at a rapid speed, and the combination of these parts of the apparatus prevents the wire or cable from running into kinks:*" and the claim at the end was thus,—"What I claim as my invention is,—first, coiling the wire or cable round a cone,—second, the supports placed cylindrically outside the coil round the cone,—third, *the use of rings in combination with the cone as described:*" and it was held that the substitution by B. of a *cylinder* having a domed or hemispherical top, for the cone or the cone with the conoidal apex in A.'s apparatus,—A.'s apparatus and B.'s being used for the same purpose, and in nearly the
*138] *same manner,—was evidence, and strong evidence, of infringement. So, here, there was no real difference between the plaintiff's machine and the defendant's. A new combination resulting in an improved or a cheaper article, has always been held to be the subject of a patent. So, the omission of a portion of an old process,—as leaving out the mandril, in Whitehouse's Patent, Russell *v.* Cowley, 1 Webster's

P. C. 459,—has been held to be the subject of a patent. Before the date of a patent, part of the garancine had been obtained from madder by boiling, and the refuse or spent madder had been thrown away as useless. It was known that the spent madder contained garancine, but no one had extracted it from the spent madder. The whole of the garancine had, however, been obtained from fresh madder by a certain process. A patent having been granted for extracting the garancine from spent madder by this process, it was held by Pollock, C. B., at nisi prius, not to be a new manufacture: Steiner *v.* Heald, 2 Car. & K. 1022 (E. C. L. R. vol. 61): but the Court of Exchequer Chamber held, on exceptions to that ruling, that it was a question for the jury: 6 Exch. 607.† Patteson, J., delivering the judgment of the court, there says,—"It appeared in evidence, that the common mode of using madder for dyeing was by grinding it to powder and putting it into the dye-bath with cloth and other things, to make the cloth take up the colouring matter. When the cloth was taken out of the bath, there remained a substance which was called 'spent madder.' It was known to dyers that this spent madder still contained colouring matter; but no mode of making use of it for dyeing purposes was known before the plaintiff's patent. Attempts were made to use it for manure, but they appear to have failed; and 'spent madder' was always thrown away as useless. Subsequently, it was *discovered, that, by the application of heat and acid to '*fresh* madder,' the *whole* colouring matter [*139 might be extracted; and when so extracted, it formed a substance called garancine; and this process was known and commonly used. Afterwards, the plaintiff discovered, that, by the same process of heat and acid, garancine could be extracted from 'spent madder,' as well as from 'fresh madder.' Here is no new contrivance; for, the process used under the plaintiff's patent with 'spent madder' is the same as that previously used with 'fresh madder:' neither is the product new; for, garancine produced from the one and the other appears to have precisely the same qualities. If, therefore, the patent be good, it must be on account of the old contrivance being applied to a new object, under such circumstances as to support the patent. Now, 'spent madder' might be a very different thing from 'fresh madder' in its properties, chemical and otherwise. Or it might be in effect the same thing as 'fresh madder' in its properties, chemical and otherwise, with the difference only that part of its colouring matter had been already extracted. Again, the properties, chemical and otherwise, of both might or might not have been known to chemists and other scientific persons, so that they could tell whether 'fresh madder' and 'spent madder' were different things, or substantially the same. These points appear to us to be questions of fact, and materially to affect the validity or invalidity of the patent, and to be questions of fact to be found by the jury by way of inference or conclusion of fact from the evidence adduced on the trial." The same principle was acted upon in Higgs *v.* Goodwin, 1 Ellis, B. & E. 529 (E. C. L. R. vol. 96). Brook *v.* Aston, 8 Ellis & B. 478 (E. C. L. R. vol. 92), is the only authority of any weight cited on the motion upon this point: but there the claim showed no novelty or invention in the mode of applying the old machinery to the new purpose.

*140] *Then as to the effect of the disclaimer. The 1st section of the 5 & 6 W. 4, c. 83, enacts "that any person who, as grantee, assignee, or otherwise, hath obtained, or who shall hereafter obtain letters patent for the sole making, exercising, vending, or using of any invention, may, if he think fit, enter with the clerk of the patents in England, &c., having first obtained the leave of His Majesty's attorney-general or solicitor-general, &c., certified by his fiat and signature, a disclaimer of any part of either the title of the invention or the specification, stating the reason for such disclaimer, or may, with such leave as aforesaid, enter a memorandum of any alteration in the said title or specification, not being such disclaimer or such alteration as shall extend the exclusive right granted by the said letters patent; and such disclaimer or memorandum of alteration, being filed by the said clerk of the patents, and enrolled with the specification, shall be deemed and taken to be part of such letters patent or such specification in all courts whatever." Then follow provisions that a caveat may be entered, that the disclaimer or alteration shall not affect actions pending, and that the party may be required to advertise the disclaimer. This statute, therefore, authorizes the entry of a disclaimer or a memorandum of alteration of any description which does not extend the patent right. The object of the disclaimer is to excise from the title or the specification a portion of the original claim which has been erroneously described. In Stocker *v.* Warner, 1 C. B. 148, 165 (E. C. L. R. vol. 50), Tindal, C. J., says: "I never can consider that the entering of a disclaimer as to part of a specification *necessarily* imports that the patent is bad. The object of that proceeding is, not merely to set right the description of the alleged invention where it is known to be wrong, but to obviate any doubt that

*141] may arise on the specification as enrolled." So, in The *Queen *v.* Mill, 10 C. B. 379, 392 (E. C. L. R. vol. 70), where the subject was fully discussed, Maule, J., says: "The act does not give the patentee an absolute and uncontrolled power to disclaim, but only subject to the discretion of the attorney or solicitor-general, who, acting as a judicial officer, is to determine whether that which is sought to be done is fit to be allowed, regard being had to the rights and interests of the public. The power to disclaim being thus given, the legislature go on to provide that 'such disclaimer or memorandum of alteration,'—that is, subject to the allowance of the attorney or solicitor-general,—'being filed by the said clerk of the patents, and enrolled with the specification, shall be deemed and taken to be part of such letters patent or such specification in all courts whatever.' It then imposes a further restriction upon the rights of the grantee,—'Provided always that any person may enter a caveat, in like manner as caveats are now used to be entered, against such disclaimer or alteration: which caveat, being so entered, shall give the party entering the same a right to have notice of the application being heard by the attorney or solicitor-general, or lord advocate, respectively.' I consider, therefore, we are bound by the words of the act to deal with the disclaimer as part of the specification as from the date of the specification, though enrolled subsequently." Taking the original specification here, together with the disclaimer and memorandum of alteration, the patentee has well described that which is properly the subject of a patent: and the evidence is abundantly sufficient to show that the defendant's machine with the spiral curves or

grooves upon the roller is an infringement of the plaintiff's invention of the roller with circular grooves, the effect of the two being to all intents and purposes the same.

Grove, Q. C., *Mellish*, and *Aston*, in support of the rule.— [*142
The thing claimed here is not properly the subject of a patent. It is admitted that the differential motion of the roller and the bowl is not new; and it is also admitted that the use of a patterned roller for embossing was well known at the date of the patent: but the patentee seeks to have a monopoly for the combination of the differential motion and the patterned roller. There is a material distinction between the application of a new contrivance to an old object, and of an old contrivance to a new object: per Lord Abinger in Losh *v.* Hague, 1 Webster's P. C. 202. To sustain a patent, there must be invention of some sort. The cases relied upon on the other side are all distinguishable: in each of them a new or improved result was produced by means before unknown. It was upon that principle that the court proceeded in Brook *v.* Aston, 8 E. & B. 478 (E. C. L. R. vol. 92). A patent was taken out in 1853, for, amongst other things, improving the texture of the threads of cotton and linen yarns by exposing the threads, in a distended state, to the action of beaters, the effect of which was to polish the sides of the threads and produce smoothness and a glacé effect. In 1856, the plaintiffs took out a patent for, amongst other things, an improvement in the finishing yarns of wool or hair, by exposing their threads in a distended state to the action of machinery which, it was admitted, was substantially the same as the machinery described in the patent of 1853. The claim in the plaintiffs' specification was, amongst other things, to the invention of "causing yarns of wool or hair whilst distended and kept separate to be subjected to the action of rotatory beaters or burnishers, whereby the fibre is closed and strengthened, and the surface effectually polished." On the trial of an action for the infringement of the plaintiffs' patent, it was proved that the process of the [*143
*patentees of 1853 had not previously been applied to wool or hair; and evidence was given that the effect upon wool was not the same as upon linen: and it was held that the plaintiffs' specification claimed what was merely the application of the old machinery in the old manner to an analogous subject, and was not the subject-matter for which a patent could be claimed, and consequently that the plaintiffs' patent was wholly void. Lord Campbell said: "It seems to me that this specification claims what is not an invention for which a monopoly can be claimed. It may well be that a patent may be valid for the application of an old invention to a new purpose; but, to make it valid, there must be some novelty in the application. Here there is none at all." The case of Seed *v.* Higgins, 8 Ellis & B. 755 (E. C. L. R. vol. 92), proceeds upon the same principle. Here, the defendant's machine is no infringement of the plaintiff's alleged invention: it differs essentially in all that can be said to be new from that described in the specification as coupled with the disclaimer.

A patentee is bound to describe his invention properly, or, as is said by Alderson, B., in Morgan *v.* Seaward, 1 Webster, P. C. 170, 173,— "It is the duty of a party who takes out a patent to specify what his invention really is; and, although it is the bounden duty of a jury to protect him in the fair exercise of his patent right, it is of great import-

ance to the public, and by law it is absolutely necessary, that the patentee should state in his specification, not only the nature of his invention, but how that invention may be carried into effect. Unless he be required to do that, monopolies would be given for fourteen years to persons who would not on their part do what in justice and in law they ought to do,—state fairly to the public what their invention is, in order that the public may be made acquainted with the means by which
*144] the *invention is to be carried into effect. That is the fair premium which the patentee pays for the monopoly he receives." The office of the disclaimer is well defined by Maule, J., in The Queen v. Mill, 10 C. B. 395 (E. C. L. R. vol. 70). "The spirit of the act," he says, "seems to be this,—that, where there are objections that go only to a small and insignificant part of a patent, which, if sustained, would defeat it altogether, the patentee might relieve himself of the difficulty by a disclaimer." A memorandum of alteration stands upon no different footing in this respect from a disclaimer." Both are intended to get rid of some technical difficulty: Webster's Practice of Inventions, p. 155; Bateman v. Bray, Macroroy's P. C. 119. To make the disclaimer good, it is not sufficient that the matter set up is within the claim in the original specification, but the invention which remains must be one that is substantially and truly described in the original specification. If not, the patentee by his disclaimer enlarges the patent, and so avoids it. *Cur. adv. vult.*

Erle, C. J., now delivered the judgment of the court:—

Upon this rule for reversing the verdict, the defendant has contended, and, we think, successfully, that the patent was invalid, on the ground that the original specification was void, and the specification under the disclaimer void also, because it is within the proviso in the statute against extending the exclusive right granted by the letters patent.

At the date of the patent, we consider that the uses of the roller and the bowl, and the means of regulating the relative speed of their motions, were well known; that, in calendering, the roller was smooth, and the
*145] speed of the two unequal; and, that, in embossing, the *roller was patterned, and the speed of the two equal; and that the possibility of combining inequality of speed with a patterned roller must have been well known, but was not in use, because for the most part the result was not only not beneficial, but was a loss, from the tearing of the cloth.

Under these circumstances, the plaintiff took out a patent for combining the use of a patterned roller with unequal speeds of the roller and the bowl. According to our construction, this is the subject of the patent: it is the only subject mentioned in the provisional specification; and, though, in the original specification, some uses of the patent invention are suggested with reference to watering patterns, these uses are distinct from the alleged patent invention.

We consider this original specification void, for want of novelty and utility. The possibility of making any roller move at any practicable speed must have been known to all who had to regulate these motions.

The patented combination, if applied according to the general terms in which it is described, was useless; and the alleged discovery that two rollers which by the design of the manufacturer were made to revolve

at equal speeds, could be made to revolve at unequal speeds, is not a subject for a valid patent.

Looking at the plaintiff's evidence of the origin of his invention, from an accidental movement by him while engraving a roller, and at the mention of a watering pattern in the specification, it may be conjectured that the suggestion of a watering pattern was intended to be the subject for the patent: and the case was so put during part of the argument. But, according to our construction, that is not so.

The plaintiff has entered a disclaimer; and his amended specification confines his invention to one kind of substance for rollers, namely, a hard metal, *and one kind of pattern for engraving thereon, [*146 namely, circular grooves around the roller. It seems to us that this is practically a claim of a new invention, and not a part of any invention comprised in the former specification. This point was very clearly put by Mr. *Aston*, who referred to the statute requiring such a specification as would give useful information when the privilege of the patentee should have expired, which is one consideration for the grant. Tried by that test, the original specification gave no information that could be beneficial. It claimed to combine inequality of speed with any pattern that might be on a roller; and, if that description was acted on, the attempt would lead to failure with all patterns except the one class of circular grooves round the roller, and the person putting it in use would have to make that discovery which is the discovery contained in the specification under the disclaimer. In The Queen *v.* Mill, 10 C. B. 395 (E. C. L. R. vol. 70), Maule, J., says, "the spirit of the act seems to be this, that, where there are objections that go only to a small and insignificant part of a patent, which, if sustained, would defeat it altogether, the patentee may relieve himself from the difficulty by a disclaimer."

If it was useful to combine inequality of motion with a pattern roller, so as to obtain lustre at the same time as the pattern, the problem for the inventor was, to select the particular substance for the roller and the particular pattern thereon that could be so used; and the invention was first made when it was first found out that a circular pattern on a roller of hard metal could be combined with inequality of motion so as to produce a beneficial result.

According to this view, the invention in the disclaimer was not in the original specification. The patentee, under colour of disclaiming, introduces a new *invention. Such a disclaimer is in effect an attempt [*147 to turn a specification for an impracticable generality into a grant for a specific process which is comprised within the generality in one sense, but could not be discovered to be there without going through the same course of experiment which led to the discovery of the specific process in the disclaimer.

In The Queen *v.* Mill, the claim was for many distinct parts: four related to pens and pen-holders; the rest to pencils and pencil-cases: the disclaimer was of the four distinct parts relating to pens and pen-holders: and it was held, that the patent was valid under the disclaimer for the remaining parts, being distinct practicable inventions clearly specified in the original specification, so that they might be put in practice from thence alone, and the disclaimer merely severed the objectionable parts.

In Seed *v.* Higgins, 8 Ellis & B. 755 (E. C. L. R. vol. 92), the original specification was for all applications of centrifugal force to flyers, so as to produce pressure on the bobbin thread. The diagram showed a new machine as an example of such application of centrifugal force at the upper part of the flyer, where it was more beneficial than in any other part. It was afterwards found that the application of centrifugal force at the lower part of the flyer was old, and the plaintiff disclaimed every application except that represented in the diagram. It was held that the patent became valid thereby for the machine so represented in the diagram, which was new and useful, and could be made therefrom.

We distinguish these two cases from the present, because in each a beneficial practical invention was originally specified. Here, we think that cannot be truly said of the plaintiff's original specification; and therefore the plaintiff's claim under this disclaimer is not supported.

*148] *The defendant further contended that no infringement was proved as to this. The plaintiff relied on the specification of circular grooves around the cylinder, and the evidence was that his machine contained from sixty-eight to seventy-two rings in an inch,—about equal to the number of warp threads in an inch of cloth; and that the defendant's machine with seventy turns of a spiral curve in an inch was the same to the eye, and equivalent in effect: and, though the number of the curves is no part of the patented invention, still, in ordinary circumstances, this would be good evidence of infringement.

But the defendant showed that his machine existed before the patent was granted. He therefore has not imitated any invention of the plaintiff; but, on the contrary, the plaintiff, if he relies on circular pattern and the number of grooves in an inch, attempts to take away rights vested in the defendant before the grant of any patent to himself. Under these circumstances, the defendant is entitled to claim that the specification under the disclaimer should be construed strictly, according to the case of Seed *v.* Higgins, above cited, where the patentee so disclaiming was confined to the precise machine described in his diagram. The plaintiff has disclaimed all patterns except circular grooves round the roller. If he meant to include spires and curves of equivalent effect with circles, he should have so expressed his claim. If he had claimed spiral curves, it is possible that the defendant's machine might have raised a question upon the novelty of the invention. At all events, spiral curves are not within the strict meaning of circular grooves: and we think we should hold the plaintiff to that strict meaning; and, under that construction, we find that the defendant did not infringe.

*149] It should be noted that the specification under the *disclaimer is open to objection on account of uncertainty. In the disclaiming part, it disclaims all patterns but circular grooves round the roller. In the retaining part, it describes as the remaining subject of the patent grooves around the roller; and in the claiming part there is no reference at all to the circular form. If a circular form, or an approach thereto, is essential for any beneficial result, an objection might be raised on this point.

We also observe that a patent for the exclusive right to one particular use of a known machine, might be objcted to. Although the patentee may have discovered how to use the machine more beneficially than the owner knew, he had no right to take a grant which virtually prohibits

the owner from an existing right over his own property. Here, the defendant had a right to use any relative speed for his roller and his bowl, to feed in any kind of cloth in any direction, either at right angles or transversely, and with or without a pattern on his roller, before the date of the patent. Then, can a patent be granted which in effect prohibits him from some use of that machine more beneficial than he had found out?

But it is not necessary to decide these questions, as the defendant succeeds on the two main grounds before mentioned.

BYLES, J.—I concur in the judgment which has just been pronounced by my Lord, but I am bound to say not without doubt upon both points.

Judgment accordingly.

*Ex parte BISHOP. *Nov.* 15. [*150

Where there has been an omission to stamp articles of clerkship within six months from the date of their execution, but they have subsequently been stamped and the penalty paid, under the 19 & 20 Vict. c. 81, s. 3,—the court will allow the service under them to be computed from the date of their execution, instead of from the date of the filing of the affidavit under the 6 & 7 Vict. c. 73, ss. 8, 9, provided it is shown to their satisfaction that the non-payment of the duty at the proper time arose from unforeseen emergency, and not from intentional neglect or design.

DENMAN moved on the part of one W. Bishop that his service under articles of clerkship executed by him on the 13th of October, 1855, might be computed from the date of the execution of the articles, and not from the day of filing the affidavit of execution.

The affidavit upon which the application was founded,—that of the father of the applicant,—stated, that his son had duly served him in his business of an attorney and solicitor, under articles dated as above, for the full period of five years, down to October last; that, at the time of the execution of the said articles, he was wholly without means to pay the stamp-duty of 80*l.* payable in respect thereof, and had continued so without means down to the 9th of October last, when he obtained a sum of 130*l.* for the purpose of enabling him to pay the duty of 80*l.*, and the further sum of 50*l.* by way of penalty; that the said articles were not, for the above reason, and no other, duly filed, enrolled, and registered within six months from the date and execution thereof; that the applicant had served his said father as managing clerk for five years and upwards, and had been employed by him in his business, including the service under the articles, for upwards of ten years preceding the 13th of October last; that the fiat of the commissioners of inland revenue had been obtained for stamping the articles with the usual stamp-duty, on payment of the penalty of 50*l.* pursuant to the 3d section of the 19 & 20 Vict. c. 81;(*a*) and that the articles together

(*a*) Which enacts that "it shall be lawful for the commissioners of inland revenue, in any case where they shall be directed so to do by the commissioners of Her Majesty's treasury, to stamp any articles of clerkship, upon payment of the duty chargeable thereon at the date thereof, and of such further sum as thereinafter specified by way of penalty, and in lieu of all other penalties, that is to say, as to any such instrument bearing date and executed before the 5th of August, 1853, the sum of 20*l.*; as to any other such instrument, where the same shall be brought to be stamped within the period of one year from the date thereof, the sum of 10*l*;

*151] with the *necessary affidavits had been filed at the master's office on the 6th instant.

It appeared, that, prior to the payment of the money, an application had been made to Mr. Justice Willes at Chambers; but that that learned judge thought the duty and penalty should be first paid, and that the motion should be made to the court.

The case of Ex parte Morton, 26 Law J., Q. B. 24, and the statutes 6 & 7 Vict. c. 73, ss. 8, 9, and 7 & 8 Vict. c. 86, s. 1, were referred to.

ERLE, C. J.—If the non-payment of the duty was the result of some unforeseen emergency, something over which the party had no control, I should be disposed to assist him: but, if the omission was intentional, and part of a scheme to make use of the service under the articles in the event of its proving a promising speculation, I should decline to grant the application. We will speak to my Brother Willes, and learn from him whether the payment of the money has taken place in consequence and upon the faith of what passed before him at Chambers.

On the following day the court intimated that the application was acceded to. Fiat.

*152] *CLEOPAS HARRIS, Appellant; GEORGE JENNS, Respondent. *Nov.* 9.

The 11 & 12 Vict. c. 49 is not repealed by the subsequent statutes, 17 & 18 Vict. c. 79, or 18 & 19 Vict. c. 118,—as supposed in Regina *v.* Whiteley, 3 Hurlst. & N. 143†; but still regulates the closing of houses for the sale of wine, spirits, beer, or other fermented or distilled liquors, during the *morning* service,—the 18 & 19 Vict c. 118, applying only to the *afternoon* service.

Upon an information before justices under the first-mentioned statute, for the sale of "British wine" within the prohibited hours, it was proved by a practical chemist that the liquor sold contained a large proportion of alcohol, and the justices found that it was "wine," within the meaning of the statute:—Held, that their conclusion was warranted by the evidence.

BY statute 11 & 12 Vict. c. 49, s. 1, "no licensed victualler or person licensed to sell beer by retail to be drunk on the premises, or not to be drunk on the premises, *or other person*, shall open his house for the sale of wine, spirits, beer, or other fermented or distilled liquors, or sell the same, on Sunday, before ½ past 12 P. M., except for refreshment for travellers,(*a*) or, where the morning service in the church, chapel, kirk, or principal place of worship of the parish or place shall not usually terminate by that time, before the time of the termination of such service."

By s. 4, "no *person* shall open any house or place of public resort for the sale of fermented or distilled liquors, or sell therein such liquors, in England or Scotland, before the hour of ½ past 12 P. M., or, &c., except as refreshment for travellers."

On the 28th of April, the appellant, Cleopas Harris, was charged before two justices of the peace for the borough of Birmingham with

after one year, and within two years, 20*l.*; after two years, and within three years, 30*l.*; after three years, and within four years, 40*l.*; and after four years, 50*l.*"

(*a*) As to the meaning of the word "traveller," in the 18 & 19 Vict. c. 118, s. 2, see Atkinson, app., Sellers, resp., 5 C. B. N. S. 442 (E. C. L. R. vol. 94), and Tayler, app., Humphreys, resp., 10 C. B. N. S.

having on Sunday, the 15th of April, before ½ past 12 P. M., to wit, at ½ past 11 A. M., unlawfully sold to one George Jenns, the respondent, a certain quantity of fermented liquor, to wit, one half pint of "made wine," in a certain house and place of public resort, situate, &c., the said George Jenns not being then a traveller, &c.

*The evidence was, that, on the day and at the hour named in the summons, the said George Jenns was at the shop of the [*153 appellant, who is a retailer of made or British wines; that he asked the appellant, who was serving customers in the shop, for half a pint of port wine; and that he thereupon received from him and paid for the liquor produced before the justices; that there were above twenty persons in the shop when he went there; and that the shop was open, and people going in and coming out.

The liquor was analyzed by a professional chemist, who stated that he had by distillation extracted from four ounces of it nearly one ounce of alcoholic spirit, and that he therefore considered it fermented liquor; that it would, doubtless, be possible to compound a mixture of sugar and water and colouring and other matters which with the addition of alcohol should resemble in taste and appearance the liquid produced, and yet not have in itself undergone fermentation; and that the alcohol which had been added might again be extracted by distillation; but that, in his opinion, the liquid which had been sold as wine was a fermented liquor.

It was contended on the part of the appellant,—first, that he did not come within the meaning of either the first or the fourth section of the above-recited act,—secondly, that there was not sufficient evidence that the liquor sold by him was really wine or a fermented liquor.

The justices were of opinion, that, even supposing the appellant did not come within the description of an "other person," in the 1st section, he clearly was within the words and meaning of the 4th section: and, as to the second objection, they found as a fact,—in doing which they considered themselves justified by the scientific evidence produced, as well as by the representation of the *appellant himself at the [*154 time of sale,—that the liquor was *wine*, and *therefore* a *fermented* liquor: and they convicted him of the offence charged, and inflicted a penalty accordingly.

The case now came before this court on appeal under the 20 & 21 Vict. c. 43.

Phipson, for the appellant.—It is submitted that the appellant does not come within the 1st section of the 11 & 12 Vict. c. 49; for, that section only applies to licensed victuallers and persons licensed to sell beer by retail: and, though the words of s. 4, upon which the justices rely to sustain their conviction, are very general, it is quite evident that "person" in that section must have been intended to mean the same as "person" in s. 1. [ERLE, C. J.—Why, is not the thing prohibited as a profanation of the Lord's day, whether the person doing it is a licentiate or not?] Then, is "made wine" a "fermented or distilled liquor" within the statute? [ERLE, C. J.—The scientific witness whom the magistrates called to their aid says it is a fermented liquor; and the man who makes it says nothing.] It is not an excisable liquor; and to such only was this statute intended to apply. [ERLE, C. J.—The main purpose of the 11 & 12 Vict. c. 49 was in respect of the

sanctity of the Lord's day, not the protection of the revenue.] Then, is the statute in question still in force? It is submitted that it is not, but that it is impliedly repealed by the subsequent statutes. Now, the 11 & 12 Vict. c. 49, which prohibits the sale of liquors before ½ past 12 P. M. on the Sunday, deals only with the *morning* service. Then comes the 17 & 18 Vict. c. 79, which deals with the *afternoon* service, s. 1 enacting that "between ½ past 2 o'clock and 6 o'clock, or after 10 o'clock in the afternoon," on Sunday, "no beer, wine, spirit, or any fermented or
*155] *distilled liquor" should be sold. This is in terms repealed by the 18 & 19 Vict. c. 118, which altered the hours to "between 3 and 5 o'clock in the afternoon, and after 11 at night." In Regina *v.* Whiteley, 3 Hurlst. & N. 143,† the Court of Exchequer held the 9 G. 4, c. 61, s. 4, which contained a provision that no person should sell beer or spirits on Sunday "before the hour of ½ past 12 of the clock in the afternoon, or, where the morning Divine service in the church, chapel, kirk, or principal place of worship shall not usually terminate by that time, before the time of the termination of such service," to be impliedly repealed by the later statutes; and they further held that the law now in force is the 18 & 19 Vict. c. 118, in which the prohibited hours are between the hours of 3 and 5 o'clock and after 11 in the afternoon." In reviewing the several enactments, Bramwell, B., after stating that the 9 G. 4, c. 61, was repealed by the 11 & 12 Vict. c. 49,—says: "Then come the two acts, 17 & 18 Vict. c. 79, and 18 & 19 Vict. c. 118. *The former repealed the provisions of the* 11 & 12 Vict. c. 49 *quoad the morning service*, and substituted a more comprehensive time in respect of the afternoon service. It is true that the afternoon service may in some places commence as early as half-past one; but legislation is directed to that which ordinarily happens. I think, therefore, that the 17 & 18 Vict. c. 79, *when read in conjunction with* the 11 & 12 Vict. c. 49, renders unnecessary or repeals the 9 G. 4, c. 61, and *consequently the only prohibition is that contained in the* 18 & 19 Vict. c. 118." [Erle, C. J.—That does not cohere. Construing it by the context, it is impossible that that learned judge could have meant it, because in truth it has no meaning; nor has it any bearing on the matter which was before the court.] Watson, B., adopting the same view, says: "The legislation
*156] with respect to public-houses and beer-houses *was amalgamated under the 17 & 18 Vict. c. 79, and 18 & 19 Vict. c. 118. The first statute on the subject is the 9 G. 4, c. 61, which, Mr. Johnston contends, remains entirely unrepealed: we must, therefore, look to the subsequent statutes to see whether that is so. There are, indeed, no express words of repeal in any of these acts; but, when we look at their provisions, it is clear that such is their effect. Mr. Johnston says that these statutes have two objects, the one to prevent tippling during the hours of Divine service, the other, to place a restriction on Sunday trading. That is not so. They all have one object, viz., to prevent public-houses and beer-shops from being open at times when it would be a desecration of the Sabbath; and for that purpose it became necessary to define the hours. Morning church service begins, in some places, as early as eight o'clock; sometimes at ten, half-past ten, eleven, and even as late as twelve. The first enactment was, that public-houses should be closed during the time of divine service in the principal church or chapel of the parish or place in which the house is situated, whether the

mother church, or a district church, or a chapel of ease. The 11 & 12 Vict. c. 49, which prohibited any person from selling beer, wine, or spirits on Sunday before half-past twelve o'clock, or until the termination of divine service, had for its object the prevention of tippling during that time. But, when we look at the subsequent legislation, which included beer-shops, we find, that, instead of defining the hours of closing by the time of divine service, they are defined by the hours of from three to five o'clock. The 17 & 18 Vict. c. 79, which applied both to public houses and beer-shops, enacted that no 'person shall open any house or place of public resort for the sale of fermented or distilled liquors, or sell therein such liquors, &c., between *half-past two and six o'clock, or after ten o'clock in the afternoon, on Sunday.' There, the hours are defined. Why are they defined? Because the time of afternoon service varies in different places: it may be two, half-past two, three, or four. Again, the 18 & 19 Vict. c. 118, which also applies both to public-houses and beer-shops, defines certain hours in the afternoon, viz., from three to five, which were meant to designate the hours during which divine service is probably being performed,—at all events, the hours mentioned would cover that period of time." And, in conclusion, the learned judge says: "For these reasons, I think it manifest that the object of all these acts is the same, and, looking at their several provisions, *I cannot doubt that the only act now in force is the* 18 & 19 Vict. c. 118." [ERLE, C. J.—In respect of the *afternoon* service. That was the matter in question before the court.] There certainly must be some misapprehension. [*157

Beasley, for the respondent, was not called upon.

ERLE, C. J.—I am of opinion that the decision of the magistrates in this case was right. The statute 11 & 12 Vict. c. 49, s. 1, enacts that "no licensed victualler or person licensed to sell beer by retail to be drunk on the premises, or not to be drunk on the premises, or *other person*, shall open his house for the sale of wine, spirits, beer, or other fermented or distilled liquors, or sell the same, on Sunday, before ½ past 12 P. M., except for refreshment for travellers:" and s. 4 enacts that "no *person* shall open any house or place of public resort for the sale of fermented or distilled liquors, or sell therein such liquors, before the hour of ½ past 12 P. M., except as refreshment for travellers." The appellant in this case is found to have *sold on Sunday before the hour mentioned that which was well proved before the magistrates to have been a highly spirituous liquor, and he was shown to have been a person other than a licensed victualler or person licensed to sell beer by retail. I think it is clear that the legislature did not intend to limit the operation of the prohibition to persons licensed. I see no sign of any such intention. I therefore think this person was properly convicted, and that his appeal must be dismissed. [*158

BYLES, J.—I am of the same opinion. The words "other person," in the 11 & 12 Vict. c. 49, evidently were intended to comprehend all the world except the persons before mentioned, viz., "licensed victuallers, or persons licensed to sell beer by retail to be drunk on the premises or not to be drunk on the premises." The appellant, not being within the exception, clearly falls within the general enactment. It is clear that the article sold by him was either a fermented or a distilled liquor. The scientific witness proved that to the satisfaction of the magistrates;

and the question was for them. As to the suggestion that the 11 & 12 Vict. c. 49, is repealed by the subsequent statutes which have been referred to,—it seems to me that there must be some misconception in the report of the case of Regina *v.* Whiteley. It does not appear that there is any statutory regulation as to the morning service except the 11 & 12 Vict. c. 49. The other statutes apply to the afternoon service only.

KEATING, J., concurred. Appeal dismissed.

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*159] *LANCELOT SHADWELL *v.* CAYLEY SHADWELL and Another, Executor and Executrix of CHARLES SHADWELL, deceased.(*a*)

A promise based on the consideration of doing that which a man is already bound to do, is invalid; and it is not necessary, in order to invalidate the consideration, that the plaintiff's prior obligation to afford that consideration should have been an obligation to *the defendant*: it may have been an obligation to a third person. Per Byles, J.

A. wrote to B. as follows,—"I am glad to hear of your intended marriage with E. N.; and, as I promised to assist you *at starting*, I am happy to tell you that I will pay to you 150*l.* yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas. Your ever affectionate uncle, A." In an action against A.'s executors for arrears of the annuity, the declaration alleged the consideration for the promise to be, "that the plaintiff would marry E. N."

Held, by Erle, C. J., and Keating, J., that the promise was binding, and made upon good consideration. Held, by Byles, J., that the letter was no more than one of kindness, creating no legal obligation.

Held, by the whole court, that B.'s continuance to practise was not a condition precedent to his right to the annuity.

THE declaration stated that the testator, in his lifetime, in consideration that the plaintiff would marry Ellen Nicholl, agreed with and promised the plaintiff, who was then unmarried, in the terms contained in a writing in the form of a letter addressed by the said testator to the plaintiff, which writing was and is in the words, letters, and figures following, that is to say, "11th August, 1838. Gray's Inn. My dear Lancey,—I am glad to hear of your intended marriage with Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you 150*l.* yearly during my life and until your annual income derived from your profession of a Chancery barrister shall amount to 600 guineas; of which your own admission will be the only evidence that I shall receive or require. Your ever affectionate uncle, Charles Shadwell:" Averment, that the plaintiff did all things necessary, and all things necessary happened, to entitle him to have the said testator pay to him eighteen of the said yearly sums of 150*l.* each respectively, and that the time for the payment of each of the said eighteen yearly sums elapsed after he married the said Ellen Nicholl, and in the lifetime of the said testator, and that the plaintiff's annual income derived from his profession of a Chancery barrister never

*160] *amounted to 600 guineas, which he was always ready and willing to admit and state to the said testator, and the said testator paid to the plaintiff twelve of the said eighteen yearly sums which first became payable, and part, to wit, 12*l.*, of the thirteenth; yet the said testator made default in paying the residue of the said thirteenth yearly

(*a*) See the case before on another point, 6 C. B., N. S. 679.

sum, which residue is still in arrear and unpaid, and in paying the five of the said eighteen yearly sums which last became payable, and the same five sums were still in arrear and unpaid: Claim, 1000*l.*

Fourth plea,—That, before and at the time of the making of the supposed agreement and promise in the declaration mentioned, the same marriage had been and was, without any request by or on the part of the testator touching the said intended marriage, but at the request of the plaintiff, intended and agreed upon between the plaintiff and the said Ellen Nicholl,—of which the testator, before and at the time of making the supposed agreement and promise, also had notice; and the same marriage was after the making of the supposed agreement and promise duly had and solemnized as in the declaration mentioned, at the request of the plaintiff, and without the request of the testator; and that, save and except as expressed and contained in the writing set forth in the declaration, there never was any consideration for the supposed agreement and promise in the declaration mentioned, or for the performance thereof.

Fifth plea,—to part of the claim of the plaintiff, to wit, to so much thereof as accrued due in and after the year 1855,—that, although the supposed agreement and promise in the declaration mentioned were made upon the terms then agreed on by the plaintiff and the testator, that the plaintiff should continue to practise and carry on the profession of such Chancery barrister as aforesaid, and should not abandon the same; yet *that, after the making of the said agreement and promise, and before the accruing of the supposed causes of action by this [*161 plea pleaded to and in the declaration mentioned, or any part thereof, the plaintiff voluntarily and without the leave or license of the testator, relinquished and gave up and abandoned the practice of the said profession of a Chancery barrister, which before and at the time of the said making of the said supposed agreement and promise he had so carried on as aforesaid; and, although the plaintiff could and might during the time in this plea and in the declaration mentioned have continued to practise and carry on that profession as aforesaid, yet the plaintiff, after such abandonment thereof, never was ready and willing to practise the same as aforesaid, but practised only as a revising barrister, that is to say, as a barrister appointed yearly to revise the lists of voters for the year for the county of Middlesex, according to the provisions of the statutes in that behalf, by holding open courts for such revision at the times and places in that behalf provided by the said statutes.

Second replication to the fourth plea,—that the said agreement declared on was made in writing, signed by the said testator, and was and is in the words, letters, and figures following, and in none other, that is to say,—setting out the letter as in the declaration,—Averment, that the plaintiff afterwards married the said Ellen Nicholl, relying on the said promise of the said testator, which at the time of the said marriage was in full force, not in any way vacated or revoked; and that he so married while his annual income derived from his profession of a Chancery barrister did not amount and was not by him admitted to amount to 600 guineas.

Second replication to the fifth plea,—that the said agreement declared on was in writing signed by the said testator, and was and is in the

*162] words, letters, and *figures set out in the next preceding replication, and in none other; and so the plaintiff said that the terms upon which it was in the fifth plea alleged that the said agreement and promise were made, were no part of the agreement and promise declared on, and the performance of them by the plaintiff was not a condition precedent to the plaintiff's right to be paid the said annuity.

The defendants demurred to the above replications, the ground of demurrer as to each being, "that the promise of the testator was voluntary only, and without consideration." Joinder.

Bullar, in support of the demurrers.(a)—The question is whether the promise stated in the declaration is founded upon any consideration,—whether the true consideration for the promise is that alleged, viz. that the plaintiff would marry the lady named. The consideration stated, and no other, must be gleaned with certainty from the contract itself: Hawes *v.* Armstrong, 1 N. C. 761, 1 Scott 661. "It is not," says Tindal, C. J., in that case, "necessary that such consideration should appear in *express terms;* it would undoubtedly be sufficient in any case if the memorandum were so framed that any person of ordinary capacity must infer from the perusal of it that such and no other was the consideration upon which the undertaking was given. Not that a mere conjecture, however plausible, that the consideration stated

*163] *in the declaration was that intended by the memorandum, would be sufficient to satisfy the statute; but there must be a well grounded inference to be necessarily collected from the terms of the memorandum, that the consideration stated in the declaration, and no other than such consideration, was intended by the parties to be the ground of the promise." In terms the document here does not contain the consideration stated in the declaration: that consideration was the former promise to assist the plaintiff "at starting;" and clearly that is not a sufficient consideration to support the promise. In Eastwood *v.* Kenyon, 11 Ad. & E. 438 (E. C. L. R. vol. 39), 3 P. & D. 276, it was held that a pecuniary benefit voluntarily conferred by the plaintiff and accepted by the defendant, is not such a consideration as will support an action of assumpsit on a subsequent express promise by the defendant to reimburse the plaintiff. In delivering the judgment of the court, Lord Denman says: "Most of the older cases on this subject are collected in a learned note to the case of Wennell *v.* Adney, 3 Bos. & P. 249, and the conclusion there arrived at seems to be correct in general, 'that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision.' Instances are given of voidable contracts, as those of infants ratified by an express promise after age, and distinguished from void contracts, as of married women, not capable of ratification by them when widows: Loyd *v.* Lee, 1 Strange 94; debts

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the promise was a voluntary act of kindness only on the part of the testator to his nephew, and was not intended to be the foundation of a legal claim in an action:

"2. That there is no consideration expressed in the writing itself, or to be properly inferred from it, which would support the plaintiff's claim."

of bankrupts revived by subsequent promise after certificate; and similar cases. Since that time some cases *have occurred upon this subject, which require to be more particularly examined." After [*164 observing upon Barnes *v.* Hedley, 2 Taunt. 184, Lee *v.* Muggeridge, 5 Taunt. 36, Cooper *v.* Martin, 4 East 76, Littlefield *v.* Shee, 2 B. & Ad. 811 (E. C. L. R. vol. 22), and Mitchinson *v.* Hewson, 7 T. R. 348, his Lordship in conclusion says:—"In holding this declaration bad because it states no consideration but a past benefit not conferred at the request of the defendant, we conceive that we are justified by the old common law of England." Chief Baron Skynner, in delivering the opinion of the judges in the House of Lords in Rann *v.* Hughes, 7 T. R. 350,(*a*) says: "It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such agreement is nudum pactum ex quo non oriter actio; and, whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration states that the defendant, being indebted as administratrix, promised to pay when requested, and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise, but the promise must be co-extensive with the consideration unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a person indebted in one right, in consideration of forbearance for a particular time, promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right: but here no sufficient consideration occurs to support the demand against her in her personal capacity; for, she derives no advantage *or convenience from the promise here [*165 made. For, if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it." In Hopkins *v.* Logan, 5 M. & W. 241,† it was held that an executed consideration, whereon the law implies a promise to pay on request (as, upon an account stated), is not sufficient to support a promise to pay at a future day. And Parke, B., says: "The promise which arises in law upon an account stated, is, to pay on request, and any other promise is nudum pactum, unless made upon a new consideration." [ERLE, C. J.—Your argument is based upon the assumption that all that the plaintiff was to do was past and gone before he received from the testator the promise of 150*l.* a year. BYLES, J.—When was the annuity to commence? What is meant by "at starting?" ERLE, C. J.—"Starting" may mean commencing his married life.] The mere performance of an act which the party was by law or agreement bound to perform, is not a sufficient consideration. Selw. Ni. Pri. 12th edit. 44, citing Jackson *v.* Cobbin, 8 M. & W. 790,† and Crowhurst *v.* Laverack, 8 Exch. 208,† per Parke, B. Here, the plaintiff being already under an engagement to marry the lady named, his promise to perform that engagement afforded no consideration: Cowper *v.* Green, 7 M. & W. 633;† Clutterbuck *v.* Coffin, 4 Scott, N. R. 509, 3 M. & G. 842; Pothier on Obligations, p. 25, Evans's translation.

As to the fifth plea, that shows a breach of a condition precedent, viz. that the plaintiff should not by his abandonment of his professional practice put it out of his power to realize the amount of income upon the realization of which the payment of the annuity was to cease.

*166] *V. Harcourt*, contrà.(*a*)—It is now settled law that the provisions of the Statute of Frauds do not apply where the consideration is executed: Souch *v.* *Strawbridge, 2 C. B. 808 (E. C. L. R. vol. 52); Green *v.* Saddington, 7 Ellis & B. 503 (E. C. L. R. vol. 90): and see the cases collected in Chitty on Contracts, 5th edit. pp. 454 et seq. Here, the promise is made by a third person, and not to the person to whom the original promise was made. In Chitty on Contracts, p. 57, it is said: "a *past* or *executed* consideration is not sufficient to support an assumpsit, unless such consideration was moved by the precedent *request*, either express or implied, of the party promising. Therefore, where A.'s servant was arrested for a trespass, and J. S., who knew A., without his knowledge bailed the servant, and afterwards A., for his friendship, promised to save him harmless,—it was held that the promise was void, because the bailing, which was the consideration, was the voluntary courtesy of J. S., and was past and executed before. And a promise, without any new consideration, to pay a debt already incurred by a third person, would fall within the same principle. But, where the plaintiff's act is moved or procured by the *request* of the party that gives the assumpsit, it will bind; for, though the promise follows, yet it is not naked, but couples itself with the precedent request, and the merits of the party procured by that suit; as if, in the case last put, the third person had been credited at the instance

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(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"*As to the demurrer to the replication to the fourth plea*,—That the agreement declared on can be sufficiently gathered from the writing:

"That the prior engagement with his intended wife did not prevent the marriage from being a sufficient consideration to support the testator's promise:

"That if before the marriage the testator might have retracted, yet, when the plaintiff married relying on the promise, the promise became as irrevocable and binding as the marriage:

"That the plea shows no retractation before the marriage:

"That it was quite unnecessary that there should be any request by the testator to the plaintiff to marry, other than the agreement:

"That the plea does not state that the parties intended that the payment should be voluntary or optional with the testator, and admits the agreement is one intended to bind:

"That, if it be suggested that the plea serves the double purpose of a denial of the contract and a plea in confession and avoidance, so as to enable the defendants on the argument to exclude the consideration of the sufficiency of the avoidance by contending that in truth the plea is non assumpsit, the court should not adopt that view which would render it proper to amend or strike out the plea, but should hold that the two questions simply are,—first, whether the writing is sufficient under the 4th section of the Statute of Frauds, and,—secondly, whether the prior engagement renders it nudum pactum, which cannot be enforced.

"*As to the demurrer to the replication to the fifth plea*,—That such a condition as the fifth plea supposes to exist cannot be gathered from the writing:

"That, if such a condition had been intended, it would naturally have been qualified by permission to leave off practice in case of weak health, old age, or other cause either absolutely preventing practice or rendering practice irksome, or preventing all reasonable prospect of success at the bar,—cases in which the presumption is that the testator intended that the provision should continue, rather than that it should cease:

"And that it is highly improbable that the condition set up by the fifth plea was contemplated by the parties, as there was apparently confidence and affection between them; and the court cannot assume that the plaintiff had not good reasons for discontinuing practice, as the form of the plea does not enable him to show by a replication what those reasons were."

of the defendant."(*a*) Again, at p. 60 (6th edit. p. 59), it is said: "A *continuing* consideration, being one in part executed, but which still continues, is also in many cases sufficient to sustain a promise; *e. g.* in consideration that the defendant had become *and was* the plaintiff's tenant, he undertook to manage the farm in a husband-like manner; or, in consideration that the lessee then in possession had occupied the land and paid his rent, to save him harmless against all persons for his occupation, 'because his occupation and prompt payment of the rent is a continuing consideration.' So, marriage is a continuing consideration. So, the payment of money for the defendant, and the having obtained a release for him, amount to a good continuing consideration for his promise. And, where the plaintiff declared, that, in consideration he had bought three parcels of land on such a day, the defendant afterwards promised to make him a sufficient assurance: the consideration was adjudged not to be absolutely past, for, the assurance was the substance of the sale."(*b*) In Rolle's Abridgment, *Action sur Case* (Q.), pl. 9, p. 12, is the following passage,—"Si A., seisie d'un shop, bargaine ove B. a leaser ceo a luy pur 5 ans, rendant 40*s.* rent, et 12*d.* d'ambideux parties est done pur performance de cest agréement, et puis, en consideration que A. faira le leas accordant al dit promise, B. promise a *paier à luy 30*l.*, sur que A. leas le shop accordant, ceo est bon consideracion d'aver action pur le 30*l.* coment que la fuit un perfect bargaine devant cest promise fait, entant que le leas fuit fait accordant al promise devant cest promise fait. Pasch. 11 Jac. B. R. enter Jones & Clarke, adjudge." So, in Com. Dig. *Action upon the Case upon Assumpsit* (B. 12), it is said: "An assumpsit lies, though the consideration be executed in part; as, in consideration that he had done a thing at my request. So, if the consideration is continuing, though the act be executed; as, in consideration that the lessee now in possession had paid his rent very well, to save him harmless; for, prompt payment of the rent is a continuing consideration, when he remains in possession (citing Pearle *v.* Unger, Cro. Eliz. 94, 1 Leon. 102). In consideration that he will make a lease according to a former agreement; for, the agreement is not executed till the lease is made." These passages from Comyns's Digest were cited and relied upon by Littledale, J., in Payne *v.* Wilson, 7 B. & C. 423 (E. C. L. R. vol. 14), 1 M. & R. 708 (E. C. L. R. vol. 17). There, the plaintiff declared in assumpsit, that, in consideration that he, at the request of the defendant, *would consent* to suspend proceedings against A. on a cognovit, defendant promised to pay 30*l.* on account of the debt (for which the cognovit was given) on the 1st of April then next: averment, that the plaintiff did suspend proceedings on the cognovit. The plaintiff at the trial proved the following agreement in writing,—"The plaintiff *having*, *at my re-*

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(*a*) The following authorities are referred to,—Hunt *v.* Bate, Dyer 272 a; Sidenham *v.* Worlington, 2 Leon. 224, 225; Lampleigh *v.* Brathwait, Hob. 106, Com. Dig. *Action upon the Case upon Assumpsit* (B.), (B. 12), 1 Saund. 264, n. (1); Lord Suffield *v.* Bruce, 2 Stark. R. 175.

(*b*) For these positions, the author cites Mattock *v.* Kinglake, 8 Ad. & E. 795, 1 P. & D. 46; Powley *v.* Walker, 5 T. R. 373; Legh *v.* Hewitt, 4 East 154; Pearle *v.* Unger, Cro. Eliz. 94, 1 Leon. 102, Bac. Abr. *Assumpsit* (D.), Com. Dig. *Action upon the Case upon Assumpsit* (B. 12); Adams *v.* Dansey, 6 Bingh. 506, 4 M. & P. 245; Marsh *v.* Rainsford, 2 Leon. 111; Sidenham *v.* Worlington, 2 Leon. 224; Web *v.* Russell, 2 Keble 99; Warcop *v.* Morse, Cro. Eliz. 138.

quest, consented to suspend proceedings against A., I do hereby, in consideration thereof, personally promise to pay 30*l.*, on account of the debt, on the 1st day of April:" and it was held,—first, that, as the request must have preceded the consent to suspend proceedings, the contract might have been declared on as an executory contract, and consequently that there was not any *variance,—secondly, that the consideration for the promise was sufficient, because it must be taken as a consent to suspend proceedings, at least until the 1st of April. [BYLES, J.—At what period was the annuity to commence?] From the time of the marriage.(*a*) In England *v.* Davidson, 11 Ad. & E. 856 (E. C. L. R. vol. 39), 3 P. & D. 594, the defendant offered a reward to whoever could give such information as would lead to the conviction of a felon: the plaintiff, who was constable and peace officer of the district where the felony was committed, gave such information; and it was held, on demurrer, that the plaintiff's having given the information was a good consideration for a promise by the defendant to pay the reward. In Chitty on Contracts, 6th edit. p. 52, it is said: "A distinction is to be taken between the case of a mere gratuitous promise and that of a promise on the faith of which one party is induced to do some act which, but for such promise, he would not have done. And therefore, although if A. promise to buy a house for B., that is nothing; yet, if A. promise to buy a house for B., but requests B. to enter into the contract of purchase in his own name, and B. does so, it would seem that the law would imply a promise on the part of A. to reimburse B. any part of the purchase-money which he may be called upon to pay,"—citing Crosbie *v.* M'Doual, 13 Ves. 148, 158, 160. [ERLE, C. J., referred to Hartley *v.* Ponsonby, 7 Ellis & B. 872 (E. C. L. R. vol. 90).] In Montefiori *v.* Montefiori, 1 Sir W. Bl. 363, Joseph Montefiori, a Jew, being engaged in a marriage treaty, his brother Moses, to assist him in his designs, and represent him as a man of fortune, gave him a note for a large sum of money as the balance of accounts between him and his brother Joseph, which balance he (Moses) acknowledged to have in his hands, though in *truth no such balance, or anything like it, existed. After the marriage, Moses reclaimed this note, as being given on no consideration; and the matter was referred to arbitration. The arbitrators awarded the note to be delivered up, which Joseph refused to do; upon which the court was moved for an attachment against him for non-performance of this award; and on his part a cross-motion was made to set aside the award, on a suggestion that the arbitrators were mistaken in point of law: and the award was set aside, on the ground that, "where, upon proposals of marriage, third persons represent anything material in a light different from the truth, even though it be by collusion with the husband, they shall be bound to make good the thing in the manner in which they represented it." So, in Bold *v.* Hutchinson, 20 Beavan 250, it was held, that, where, upon the marriage of two persons, a third party makes a representation, upon the faith of which that marriage takes place, he will be bound to make good that representation. As to the fifth plea,—it is said that it was a condition precedent to the plaintiff's right to the annuity that he should continue the exercise of his profession of a barrister. His deriving an income of

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(*a*) The plaintiff's professional career commenced in Easter Term, 1832.

600 guineas a year from that source, however, clearly was nothing more than a defeasance,—an event on the happening of which the plaintiff was to cease to receive the 150*l.* a year.

Bullar, in reply.—The interpretation put upon the letter in question in the declaration, viz., that the defendant's promise was made "in consideration that the plaintiff would marry Ellen Nicholl," is not the true one. Unless the consideration so alleged be established, the action fails. Looking at the letter and all the surrounding circumstances, it is plain that it was not intended to be anything more than an act *of kindness towards his nephew on the part of the testator. In [*172 delivering the judgment of the court in Eastwood *v.* Kenyon, 11 Ad. & E. 438, 452 (E. C. L. R. vol. 39), Lord Denman says: "Lampleigh *v.* Brathwait, Hob. 105, is selected by Mr. Smith (1 Smith's Leading Cases 67) as the leading case on this subject, which was there fully discussed, though not necessary to the decision. Hobart, C. J., lays it down that 'a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But, if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for, the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit; which is the difference;' a difference brought fully out by Hunt *v.* Bate, Dyer 272 a, there cited, where a promise to indemnify the plaintiff against the consequences of having bailed the defendant's servant, which the plaintiff had done without request of the defendant, was held to be made without consideration: but a promise to pay 20*l.* to plaintiff, who had married defendant's cousin, but at defendant's special instance, was held binding. The distinction is noted, and was acted upon, in Townsend *v.* Hunt, Cro. Car. 408, and indeed in numerous old books; while the principle of moral obligation does not make its appearance till the days of Lord Mansfield, and then under circumstances not inconsistent with this ancient doctrine when properly explained." In Thomas *v.* Thomas, 2 Q. B. 851, 859 (E. C. L. R. vol. 42), Patteson, J., says: "Consideration means something which is of some value in the eye of the law, moving from the plaintiff: it may be some benefit to the plaintiff or some detriment to the defendant; but, at all events, it must be moving from the plaintiff." *Cur. adv. vult.*

*The court not being unanimous, the judgment was now pro- [*173 nounced as follows:—

ERLE, C. J.—The question raised by the demurrer to the replication to the fourth plea, is, whether there is a consideration which will support the action on the promise to pay the annuity of 150*l.* per annum. If there be such a consideration, it is a marriage, and therefore the promise is within the Statute of Frauds, and the consideration must appear in the writing containing the promise, that is, in the letter of the 11th of August, 1838, construed with the surrounding circumstances to be gathered therefrom, together with the averments on the record.

The circumstances are, that the plaintiff had made an engagement to marry one Ellen Nicholl, that his uncle had promised to assist him at starting,—by which, as I understand the words, he meant on commencing his married life. Then the letter containing the promise declared on is sent, to specify what that assistance would be, namely, 150*l.* per annum during the uncle's life, and until the plaintiff's professional income

should be acknowledged by him to exceed 600 guineas per annum; and the declaration avers, that the plaintiff, relying on this promise, without any revocation on the part of the uncle, did marry Ellen Nicholl.

Now, do these facts show that the promise was in consideration either of a loss to be sustained by the plaintiff or a benefit to be derived from the plaintiff to the uncle, at his, the uncle's, request? My answer is in the affirmative.

First, do these facts show a loss sustained by the plaintiff at his uncle's request? When I answer this in the affirmative, I am aware that a *174] man's marriage with the woman of his choice is in one sense a *boon, and in that sense the reverse of a loss: yet, as between the plaintiff and the party promising to supply an income to support the marriage, it may well be also a loss. The plaintiff may have made a most material change in his position, and induced the object of his affection to do the same, and may have incurred pecuniary liabilities resulting in embarrassments which would be in every sense a loss if the income which had been promised should be withheld; and, if the promise was made in order to induce the parties to marry, the promise so made would be in legal effect a request to marry.

Secondly, do these facts show a benefit derived from the plaintiff to the uncle, at his request? In answering again in the affirmative, I am at liberty to consider the relation in which the parties stood and the interest in the settlement of his nephew which the uncle declares. The marriage primarily affects the parties thereto; but in a secondary degree it may be an object of interest to a near relative, and in that sense a benefit to him. This benefit is also derived from the plaintiff at the uncle's request. If the promise of the annuity was intended as an inducement to the marriage, and the averment that the plaintiff, relying on the promise, married, is an averment that the promise was one inducement to the marriage, this is the consideration averred in the declaration; and it appears to me to be expressed in the letter, construed with the surrounding circumstances.

No case showing a strong analogy to the present was cited: but the importance of enforcing promises which have been made to induce parties to marry has been often recognised; and the cases cited, of Montefiori v. Montefiori, 1 W. Bl. 363, and Bold v. Hutchinson, 20 Beavan 250, are examples. I do not feel it necessary to advert to the numerous *175] authorities referred to in *the learned arguments addressed to us, because the decision turns upon the question of fact, whether the consideration for the promise is proved as pleaded. I think it is; and therefore my judgment on the first demurrer is for the plaintiff.

The second demurrer raises the question whether the plaintiff's continuance at the bar was made a condition precedent to the right to the annuity. I think not. The uncle promises to continue the annuity until the professional income exceeds the sum mentioned. I find no stipulation that the annuity shall cease if professional diligence ceases,—no limitation except a defeasance in case of an amount of income from the other source. If the prospect of success at the bar had failed, a continuance to attend the courts might be an unreasonable expense. My judgment on this demurrer is also for the plaintiff.

The above is the judgment of my Brother Keating and myself.

Byles, J.—I am of opinion that the defendant is entitled to the judg-

ment of the court on the demurrer to the second replication to the fourth plea.

It is alleged by the fourth plea that the defendant's testator never requested the plaintiff to enter into the engagement to marry, or to marry; and that there never was any consideration for the testator's promise, except what may be collected from the letter itself as set out in the declaration.

The inquiry therefore narrows itself to this question,—Does the letter itself disclose any consideration for the promise? the consideration relied on by the plaintiff's counsel being the subsequent marriage of the plaintiff. I think the letter discloses no consideration. It is in these words,—"11th August, 1838. Gray's Inn. My dear Lancey,—I am glad to hear of your *intended marriage with Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you [*176 that I will pay to you 150*l.* yearly during my life and until your annual income derived from your profession of a Chancery barrister shall amount to 600 guineas; of which your own admission will be the only evidence that I shall receive or require. Your ever affectionate uncle, Charles Shadwell."

It is by no means clear that the words "at starting" mean "on marriage with Ellen Nicholl," or with any one else. The more natural meaning seems to me to be, "at starting in the profession;" for, it will be observed that these words are used by testator in reciting a prior promise made when the testator had not heard of the proposed marriage with Ellen Nicholl, or, so far as appears, heard of any proposed marriage. This construction is fortified by the consideration that the annuity is not in terms made to begin from the marriage, but, as it should seem, from the date of the letter: neither is it in terms made defeasible if Ellen Nicholl should die before marriage.

But, even on the assumption that the words "at starting" mean *on marriage*, I still think that no consideration appears, sufficient to sustain the promise. The promise is one which by law must be in writing; and the fourth plea shows that no consideration or request dehors the letter existed, and therefore that no such consideration or request can be alluded to by the letter.

Marriage of the plaintiff at the testator's express request would be no doubt an ample consideration. But marriage of the plaintiff without the testator's request is no consideration to the testator. It is true that marriage is or may be a detriment to the plaintiff: but detriment to the plaintiff is not enough, unless it either be a benefit to the testator, or be treated by the *testator as such by having been suffered at his [*177 request. Suppose a defendant to promise a plaintiff,—"I will give you 500*l.* if you break your leg,"—would that detriment to the plaintiff, should it happen, be any consideration? If it be said that such an accident is an involuntary mischief, would it have been a binding promise if the testator had said,—"I will give you 100*l.* a year while you continue in your present chambers?" I conceive that the promise would not be binding, for want of a previous request by the testator.

Now, the testator in the case before the court derived, so far as appears, no personal benefit from the marriage. The question, therefore, is still further narrowed to this point,—Was the marriage at the testator's request? *Express* request there was none. Can any request

be *implied?* The only words from which it can be contended that it is to be implied, are the words "I am glad to hear of your intended marriage with Ellen Nicholl." But it appears from the fourth plea that the marriage had already been agreed on, and that the testator knew it. These words, therefore, seem to me to import no more than the satisfaction of the testator at the engagement,—an accomplished fact. No request can, as it seems to me, be inferred from them. And, further, how does it appear that the testator's implied request, if it could be implied, or his promise, if that promise alone would suffice, or both together, were intended to cause the marriage or did cause it, so that the marriage can be said to have taken place *at* the testator's request? or, in other words, *in consequence of* that request?

It seems to me not only that this does not appear, but that the contrary appears; for, the plaintiff before *the letter had already bound himself to marry, by placing himself not only under a moral but under a legal obligation to marry; and the testator knew it.

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The well known cases which have been cited at the bar in support of the position that a promise based on the consideration of doing that which a man is already bound to do is invalid, apply in this case. And it is not necessary, in order to invalidate the consideration, that the plaintiff's prior obligation to afford that consideration should have been an obligation to *the defendant.* It may have been an obligation to a third person: see Herring *v.* Darrell, 8 Dowl. P. C. 604; Atkinson *v.* Settree, Willes 482. The reason why the doing what a man is already bound to do is no consideration, is, not only because such a consideration is in judgment of law of no value, but because a man can hardly be allowed to say that the prior legal obligation was not his determining motive. But, whether he can be allowed to say so or not, the plaintiff does not say so here. He does, indeed, make an attempt to meet this difficulty by alleging in the replication to the fourth plea that he married *relying* on the testator's promise: but he shrinks from alleging, that, though he had promised to marry before the testator's promise to him, nevertheless he would have broken his engagement, and would not have married without the testator's promise. A man may *rely* on encouragements to the performance of his duty, who yet is prepared to do his duty without those encouragements. At the utmost the allegation that he *relied* on the testator's promise seems to me to import no more than that he believed the testator would be as good as his word.

It appears to me, for these reasons, that this letter is no more than a letter of kindness, creating no legal obligation.

*In their judgment on the other portion of the record, I agree with the rest of the court. Judgment accordingly.(a)

*179]

(a) The plaintiff dying shortly after the judgment was given, and his representatives not being desirous of continuing the litigation, the matter was compromised.

WALTERS, Appellant; WILLIAMS, Respondent. *Nov.* 19.

The court will not, at the instance of the justices, pronounce any opinion upon a case stated pursuant to the 20 & 21 Vict. c. 43, where the appellant and respondent decline to appear.

THIS was an appeal against a decision of justices, to obtain the opinion of the court, in pursuance of the statute 20 & 21 Vict. c. 43.

Neither the appellant nor the respondent appeared: but *Scotland*, on behalf of the justices, prayed that the court would assist them by giving their opinion upon the question submitted.

PER CURIAM.—The matter is not judicially before us. Until the parties to the appeal present themselves, we cannot entertain it.

Appeal withdrawn.

*STEARS *v.* THE SOUTH ESSEX GAS-LIGHT AND COKE COMPANY. *Nov.* 19. [*180

To a count on a contract under which the defendants, a gas company, were to pay the plaintiff a certain sum for erecting buildings, &c., and laying down pipes and mains for the company, the defendants pleaded "for defence on equitable grounds," that, before and at the time of making the agreement, the company was registered pursuant to the 7 & 8 Vict. c. 110; that the agreement was made and entered into before the passing of the Joint Stock Company's Act, 1856, and whilst the first-mentioned act remained in full force; that the plaintiff before and at the time of making the contract was a director of the company; that, whilst such director, he was concerned and interested in the contract; and that, whilst such director and so interested and concerned, he voted and acted as a director on the subject of the contract, contrary to the first-mentioned act:—Held, that the plea was a good answer.

The defendants further pleaded "for defence on equitable grounds," that the company were induced to and did enter into the contract on the terms and conditions that the plaintiff would guaranty and secure to the shareholders of the company a clear net annual dividend at the rate of 6*l.* per cent. per annum on the amount of paid up capital, and on the faith of the plaintiff's giving such guarantee or security; but that the plaintiff had never given or entered into such security, nor had any such dividend ever been paid, although all things were done and performed on the part of the company and the shareholders thereof which were necessary to entitle them to have such guarantee or security given and entered into and such dividend paid as aforesaid, and the respective times for the giving and entering into such security, and for the payment of a great part of the dividend, elapsed before suit:—Held, no answer to the action,—the failure to perform the contract alleged in the plea being only ground for a cross action.

To a plea of accord and satisfaction by the delivery by the defendants to the plaintiff, and acceptance by him, of divers moneys and executing and delivering to him divers deeds and securities for money, and allotting him divers shares in the company,—an equitable replication (as to the deeds and securities), that such deeds and securities were delivered to and accepted by the plaintiff on the faith of a representation by the defendants that they were valid and binding securities, whereas they were not valid and binding on the company, and were before suit repudiated by them, was held good.

THE first count of the declaration stated, that theretofore, to wit, on the 28th of July, 1853, by articles of agreement made and concluded by and between the South Essex Gas-Light and Coke Company (the defendants) of the one part, and the plaintiff of the other part, signed by three of the directors of the said company, and duly sealed with the common seal of the said company, after reciting that the said company were and became completely registered as a joint stock company, and received a certificate thereof on the 27th of May, 1853, by the style and title of "The South Essex Gas-Light and Coke Company," for the purpose of lighting with gas the parishes and places of Leyton, Leytonstone,

*181] Walthamstow, Wanstead, and *Woodford, and the precincts, places, and roads therein and thereabouts; and that the plaintiff had already laid down in Walthamstow a considerable length of main and pipe for the supply of gas to that place, and that Thomas Edge had also laid down in Leyton a considerable length of main and pipes for the supply of gas to that place, which latter mains and pipes the plaintiff had then become possessed of by virtue of an arrangement made by and between him and the said Thomas Edge, and that it had been considered desirable for the benefit of the said South Essex Gas-Light and Coke Company that they should be in the sole and uninterrupted possession of the whole of the aforesaid district for the purposes of lighting the same with gas, and also that the same district should extend to and be limited by the boundaries of the several parishes or places of Leyton, Leytonstone, Walthamstow, Wanstead, and Woodford only, and that mains and pipes should be laid over the whole of the said district, and, as the same might be considered desirable and advisable, to carry and lay down mains and pipes into and over a considerable portion of the said district, and also to build, erect, and lay down buildings, erections, machinery, and a plant for the manufacture and supply of gas and the products to arise therefrom, as more fully mentioned and set forth in the specification to the reciting agreement annexed, which the directors of the said company had agreed with the plaintiff (leave and license being in the first place procured and obtained by the said directors at their expense from all necessary parties to enable the plaintiff to do the same), to erect and build, lay down, construct, carry out, and complete the said several buildings, erections, and plant, and the said several mains, pipes, and machinery mentioned and set forth in the said *182] specification, at or for the sum of *9500*l.*; and that the said company had, by an indenture of lease bearing date as therein mentioned, become possessed of a piece of land situate near to Lea Bridge, in the aforesaid district, the plaintiff, for himself, his executors, administrators, and assigns, did, by the said articles of agreement, contract, promise, and agree to and with the defendants, in consideration of the said sum of 9500*l.* to be paid to him the plaintiff by the said directors as thereinafter mentioned, that he the plaintiff should and would, with all due speed and expedition, and in a good and workmanlike manner, erect and build on the aforesaid piece of land, the said land being provided by and at the expense of the said company, all the several buildings, erections, and works, and construct and lay in and on the said land, buildings, erections, and works, the several apparatus and machinery, mains, pipes, and connections more particularly mentioned and set forth in Nos. 1 and 2 of the specification to the said articles of agreement annexed; and also should and would (the aforesaid permission being obtained from the necessary parties by and at the expense of the said company) excavate, lay down, construct, and make good and perfect all the several roads, ways, matters, works, mains, pipes, connections, and things which were more particularly mentioned and set forth in No. 3 of the specification to the said articles of agreement annexed, and the table and the rate of prices for measurement of the mains and pipes therein contained, at and for the price or sum of 9500*l.*: and it was by the said articles of agreement also agreed by and between the said parties, that, if the plaintiff should

by the direction of the said directors lay down a greater length or larger size of main than was mentioned in the said specification, the said extension in length or size should be paid for by the defendants to *the plaintiff in addition to the said sum of 9500*l.*, by measurement, according to the table to the said specification thereto [*183 annexed for variations, extensions, or alterations; and, if the plaintiff should, by the direction of the said directors, lay down a smaller length or less size of main than was mentioned in the said specification, the said diminution in length or size should be allowed for to the defendants by the plaintiff according to the table before mentioned: Provided always, that any extensions to or diminutions in any of the said mains and pipes should be subject to a corresponding increase or decrease to or from the prices in the said table stated, according to whether the price of iron was higher or lower than at the time of making that agreement: And it was by the said articles of agreement further agreed by and between the said parties, that, as the plaintiff had already done and performed at Walthamstow a large quantity of the work mentioned in the said specification, and a large quantity had also been done in the parish of Leyton by the said Thomas Edge, which the plaintiff had purchased from the said Thomas Edge, that the same should be and was thereby approved and sanctioned, and that the sum of 2000*l.* should be paid to the plaintiff by the defendant on account thereof on the 10th of August then next, or as soon after that day as the defendants should be in possession of a sufficient sum to enable them to do so; and should afterwards pay to the plaintiff, as the said works proceeded, such sum monthly on the first of every month as should be equal to or about three-fourths of the amount at that time due or owing to him under that contract,—it being understood, that, if such sums should not be paid within ten days after the first of every month, then that the plaintiff should have the right of taking paid up shares for such amount then overdue; and, on the completion of the *same, should forthwith pay to the plaintiff such sum as should be then due and owing to him,—and [*184 it being also understood that the plaintiff should give the said directors ten days' notice of the amount he required at each and every monthly or other payment: And it was by the said articles of agreement further agreed by and between the said parties, that the plaintiff should and would with all due and convenient speed and expedition (the aforesaid directors performing their part of this agreement) proceed with, and make, do, and complete, in a good and workmanlike manner, all and every of the works, matters, and things therein or in the said specification thereto annexed contained, and connect and perfect the same in such manner that the same or at least 200 burners should be complete for lighting with gas on or before the 1st of January then next; and, on such works being completed as aforesaid (or within such further time as the said directors should allow for completing the same, not exceeding six months from the said 1st of January), they should give to the plaintiff a certificate of such completion under the seal of the said company, and the same should be evidence of the completion of this contract in any court of law or equity: And by the said articles of agreement it was further provided, that all persons dealing with the said company, or supplying them with any goods or materials, or performing any work or labour, whether under contract or otherwise, were to take notice that all

contracts or other instruments required in any transactions with or on behalf of the company were to be given under the hands of not less than three of the said directors, and be sealed with the common seal of the company; and that there should be contained therein or endorsed thereon, and in every other contract to be entered into on behalf of the
*185] said company in or about the premises, *a reference to the deed of settlement of the said company, which was completely registered on the 27th of May, 1853, a proviso limiting the scope and effect of the contract thereby created, so that the same should take effect and be satisfied only out of such funds and property of the company as under the provisions of the said deed of settlement should at the time when such liability should accrue be at the disposal of the directors in that behalf, and negativing an unconditional liability, and thereupon that the contract created or made by the said articles of agreement was specially to be subject to the aforesaid condition: Averment, that, before suit, all things had happened necessary to entitle the plaintiff to payment of the aforesaid sums of 9500*l.* and 2500*l.*: Breach, that no part thereof had been paid: And the plaintiff further said, that, after the making of the said articles of agreement, and before suit, the plaintiff, by the direction of the said directors, laid down a greater length and larger size of main than was mentioned in the said specification, whereby he became entitled to payment before suit of a further large sum of money, to wit, 2000*l.*, yet that no part thereof had been paid: And, although the defendants, after the making of the said articles of agreement, to wit, by the said directors, gave directions to and retained and employed the plaintiff to lay down divers other mains in and upon divers roads within the aforesaid places, and the plaintiff accepted such retainer and employment, and was always ready and willing to lay down such mains; yet the defendants did not nor would at any time, as they ought to and could have done, according to the said contract, obtain any permission, leave, or license from the necessary parties for the plaintiff to lay down such other mains, whereby the plaintiff was prevented from laying down such mains,
*186] and from carning a large sum of money for so *doing, and was compelled to sell at a great loss divers large quantities of mains which he had necessarily purchased in order to carry out the said directions of the said directors.

The second count stated, that theretofore, to wit, on the 2d of August, 1853, it was agreed by and between the plaintiff and the defendants, that, in consideration that the plaintiff would, at the request of the defendants, supply at his own expense engineering superintendence and his own time and services for that purpose, as well as maps and plans necessary for carrying out the work, the defendants should and would pay to the plaintiff 3*l.* 10*s.* per cent. on all outlay and contracts for and on behalf of the said company in which he the plaintiff should be concerned either as engineer or contractor of the company; and, although, after the making of the said agreement, and before suit, the plaintiff under and by virtue of the said agreement was concerned as engineer and contractor of the defendants in divers outlays and contracts for and on behalf of the said company, and the plaintiff in all respects performed his part of the said agreement, whereby there had before suit become due and payable from the defendants to the plaintiff for and in respect

of the sum of 3*l.* 10*s.* per cent. so agreed to be paid as aforesaid a large sum of money, to wit, 1000*l.*, yet no part thereof had been paid.

The third count stated, that theretofore, to wit, on the 16th of December, 1853, by deed sealed with the common seal of the defendants, and purporting to be made by virtue of a power contained in the deed of settlement of the said company bearing date the 11th of May, 1853, and under the authority of a resolution passed at two general meetings of the shareholders of the said company held on the 29th of November, 1853, *and 13th of December, 1853,—it was witnessed, that, in consideration of the sum of 300*l.* of lawful British money paid [*187 by the plaintiff to the said company, the property, effects, and profits of the said company were thereby charged with and made liable to pay unto the plaintiff the said sum of 300*l.*, together with interest for the same at and after the rate of 5*l.* for every 100*l.* for a year, payable by the coupons thereunto annexed; and it was thereby also agreed that the said principal sum of 300*l.* should be repaid by the defendants to the plaintiff on the 16th of December which would be in the year 1858, out of the corporate assets of the said company, which should be alone charged and chargeable with the said sum of 300*l.* and interest, the said interest to be payable to the plaintiff or bearer as aforesaid, in the manner and at the time and place in the said coupons mentioned, that is to say, half-yearly, on the 16th of June and the 16th of December, upon presentation at each of the said half-yearly periods of one of the said coupons at Messrs. Masterman & Co.'s, London, bankers to the defendants; and that, although all things existed and had before suit happened necessary to entitle the plaintiff to payment of the said sum of 300*l.* and interest as aforesaid, yet no part thereof had been paid.

The fourth, fifth, sixth, seventh, and eighth counts were founded on other debentures, and were similar to the third count; and the ninth was a common count for goods bargained and sold, goods sold and delivered, money lent, money paid, work and materials, interest, and money due upon accounts stated.

The defendants, amongst other pleas, pleaded,—seventhly, as to the first count, for defence on equitable grounds, that, before and at the time of making the said articles of agreement, the said company was a joint stock company which had obtained a certificate *of complete registration and was completely registered under and in [*188 pursuance of the 7 & 8 Vict. c. 110; that the said articles of agreement were made and entered into before the passing of "The Joint Stock Companies Act, 1856" (19 & 20 Vict. c. 47), and whilst the said first-mentioned act remained in full force, to wit, on the said 28th of July, 1853; that the plaintiff, before and at the time of the making and entering into of the said articles of agreement and the contract therein contained, was a director of the said company within the meaning of such first-mentioned act; that the plaintiff, whilst and during the time he was such director, and before and at and during and after the respective times of making and entering into of the said articles of agreement and contract, and the carrying the same into effect, was concerned and interested in the said contract, and whilst the plaintiff was and remained such director, and so concerned and interested as aforesaid, he the plaintiff voted and acted as a director on the subject of the said contract, that is to say, in and upon and with respect to the making of

the said contract and the approving the terms thereof on behalf of the said company, and otherwise on the subject of the same, contrary to the said first-mentioned act.

Eighthly, as to the first count, and for defence on equitable grounds, that the said company were induced to and did make and enter into the said articles of agreement on the terms and conditions that the plaintiff should and would guaranty and secure to the satisfaction of the directors of the said company the regular payment for and during the term of ten years to the shareholders of and in the said company of a clear net annual dividend at the rate of 6*l.* per cent. per annum on the amount of capital paid up, or in respect of their respective shares of and in the
*189] said *company, and on the faith of the plaintiff giving such guarantee and security; but that the plaintiff had never made, given, or entered into such guarantee or security, nor had any such dividend ever been paid, although all things were done and performed on the part of the said company and the respective shareholders thereof and therein, which were necessary to entitle them to have such guarantee or security made, given, and entered into, and such dividend paid as aforesaid, and the respective times for the making, giving, and entering into of such guarantee, and for the payment of a great part of the dividend, elapsed before this suit; and that, if such guarantee or security had been given, and such dividend had been paid, the shares of and in the said company would have been of great value, but, by reason and in consequence of the default of the plaintiff in that behalf, the same were of little or no value, and the said company had become and been under the necessity of being and was being wound up in the High Court of Chancery.

The eleventh plea, to the second count, was similar to the seventh plea; and the twelfth plea to the second court, was similar to the eighth plea.

The fifteenth plea,—as to the third, fourth, fifth, sixth, seventh, and eighth counts, for defence on equitable grounds, stated, that, before and at the time of making of the said several deeds in those counts respectively mentioned and sued upon, and each and every of them, the said company was a joint stock company which had obtained a certificate of complete registration, and was completely registered under and in pursuance of the 7 & 8 Vict. c. 110; and that the said several deeds sued upon were respectively made and entered into before the passing of the "Joint Stock Companies Act, 1856," (19 & 20 Vict. c. 47), to wit, on
*190] *the several days in the said third, fourth, fifth, sixth, seventh, and eighth counts respectively mentioned in that behalf, and whilst the said first-mentioned act was and remained in full force; and that the plaintiff, before and at the respective times of the making and entering into of the said several deeds sued upon, and each and every of them, was a director of the said company within the meaning of such first-mentioned act; and that the plaintiff, whilst and during the time he was such director, and before, and at, and during, and after the respective times of the making and entering into of the said several deeds sued upon, and each and every of them, was concerned and interested in the said several deeds sued upon, and the contracts therein respectively contained; and that, whilst the plaintiff was and remained such director, and so concerned and interested as in this plea aforesaid, he

the plaintiff voted and acted as a director on the subject of the said several deeds sued upon, and the contracts therein respectively contained, and each and every of them, contrary to the said first-mentioned act.

The twentieth plea, to the last count, was similar to the seventh plea; and the twenty-first plea, to the last count, was similar to the eighth plea.

The plaintiff demurred to the seventh, eleventh, fifteenth, and twentieth pleas, on the ground that "the bare circumstance that the plaintiff voted and acted as in those pleas respectively alleged affords no defence whatever to the first count."

He also demurred to the eighth, twelfth, and twenty-first pleas, on the ground that "the performance by him of the terms and conditions in the eighth plea mentioned was not a condition precedent to the defendants' performance of their contract."

The twenty-fourth plea,—as to the first, third, fourth, fifth, sixth, seventh, and eighth counts of the *declaration,—for defence on equitable grounds, stated, that, before action, the defendants [*191 satisfied and discharged the part of the plaintiff's claim therein pleaded to by paying to the plaintiff divers moneys, and executing and delivering to the plaintiff divers deeds and securities for money, and allotting to the plaintiff divers shares of and in the said company, and which moneys, deeds, securities, and shares the plaintiff then accepted and received in such satisfaction and discharge.

Replication to the twenty-fourth plea, "on equitable grounds,"(*a*)—as to so much of the plaintiff's claim as is by the twenty-fourth plea alleged to have been satisfied by the execution and delivery of deeds and securities,—that the said deeds and securities were delivered to and accepted by the plaintiff as in that plea mentioned, on the faith of a representation then made by the defendants to the plaintiff that such deeds and securities were valid deeds and securities creating a liability on the part of the defendants to pay thereunder divers large sums of money, and of great value to the plaintiff, and not otherwise; whereas, in truth and in fact, such deeds and securities were not at any time valid deeds or securities, and did not create any liability whatever on the defendants as aforesaid, as the defendants always well knew or ought to have known, and that the defendants always assented to recognise and adopted the invalidity thereof, and before suit wholly disaffirmed and repudiated all liability thereunder; and that, by means of the premises, the said deeds and securities had not been at any time and never would be of any validity or value whatever.

*The defendants demurred to the replication to the twenty-fourth plea, on the ground "that the plea is indivisible, and that [*192 the fact that the deeds were invalid was therefore no answer to any part of the plea." Joinder.

S. Temple, Q. C. (with whom was *Milward*), for the plaintiff.(*b*)—

(*a*) These words were added by way of amendment, on the argument.

(*b*) The points marked for argument on the part of the plaintiff, were as follows :—

"That the 7th, 11th, 15th, and 20th pleas are bad, because such pleas do not show that the company was in any way damnified by the acts of the plaintiff set up in those pleas, or that the contract was unfair or unreasonable, and because, as it stands admitted that the defendants have received all the benefit of the contract, the voting and acting in those pleas alleged does not disentitle the plaintiff in equity to the payment of moneys due to him, unless it be shown that the plaintiff was guilty of fraud or that the contract was unjust and unreasonable; and that

*193] The first set of pleas, viz. the 7th and *8th, allege the plaintiff to be disentitled to recover by reason of the 29th section of the 7 & 8 Vict. c. 110. That section enacts, "that, if any director of a joint stock company registered under this act be either directly or indirectly concerned or interested in any contract proposed to be made by or on behalf of the company, whether for land, materials, work to be done, or for any purpose whatsoever, during the time he shall be a director, he shall, on the subject of any such contract in which he may be so concerned or interested, be precluded from voting or otherwise acting as a director; and that, if any contract or dealing (except a policy of assurance, grant of annuity, or contract for the purchase of an article, or of service, which is respectively the subject of the proper business of the company, such contract being made upon the same or the like terms as any like contract with other customers or purchasers) shall be entered into in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose; and that no such contract shall have force until approved and confirmed by the majority of votes of the shareholders present at such meeting." The statute does not declare the contract void; but merely prohibits the director so interested in it from voting or acting as a director on the *194] subject of such contract. If the *plaintiff had been prevented from performing the contract on his part, he could not have sued the defendants for a breach of it. But, where the company have had all the benefit they could derive from the contract, there is nothing in the statute to relieve them from the payment of the stipulated price. The general averment that all things had happened necessary to entitle the plaintiff to payment of the stipulated sums, amounts to an allegation that whatever was necessary to give force to the contract had been done.(a) Whether or not the contract had been approved and confirmed at a meeting of the shareholders, is a matter that is more exclusively in the knowledge of the defendants than in that of the plaintiff; and, if it had not been so approved and confirmed, the defendants should have replied to that fact. If the contract is of no force, the pleas are not good as equitable pleas, unless they go on to show that the parties could be

it is to be assumed that the plaintiff has acted with entire good faith throughout, because the contrary is not suggested:

"That the 8th, 12th, and 21st pleas are bad, because such pleas do not show that the terms and conditions mentioned in those pleas were incorporated in the contracts set up by the plaintiff or were made contemporaneously with such contracts, or, as to the counts on the specialties, that such terms and conditions were contained in any instrument under seal:

"Because the performance of such terms and conditions is not shown to be a condition precedent to the performance by the company of the alleged contracts on their part:

"Because such pleas do not show that the plaintiff's alleged default occasioned the defendants' breaches of contracts:

"Because it is not made to appear that the plaintiff was any party to such terms or conditions as in the last plea mentioned, or that the failure to give such guarantee or security as therein mentioned was attributable to him:"

And, as to the demurrer to the second replication to the 24th plea,—"That such plea is a divisible plea, and that the replication is therefore a good answer to so much of that plea as it is addressed to; that, if such plea be not divisible, such replication furnishes no answer to the entire plea, because it shows that the plaintiff's claim was not entirely satisfied; and that it is no objection to such replication that it is pleaded to a part of such plea only."

(a) As to the effect of this general allegation of performance, see Roberts v. Brett, 6 C. B., N. S. 633 (E. C. L. R. vol. 95), per Crompton, J.

restored to their original condition: Wood *v.* Downes, 18 Ves. 120; Anderson *v.* Radcliffe, 1 Ellis, B. & E. 806 (in error, 819) (E. C. L. R. vol. 96). That cannot be done here. An equitable plea is only allowed where the facts disclosed are such as would afford ground for an absolute perpetual injunction in a court of equity: The Mines Royal Society *v.* Magnay, 10 Exch. 489.†

Then, the pleas addressed to the second count afford no answer thereto. The subject-matter of that count comes within the exception in the 29th section of the 7 & 8 Vict. c. 110. The contract is for the purchase of articles, and for the services of an engineer. [ERLE, C. J. —The plaintiff is engaged to superintend the performance of certain work under a contract de facto. If the engineer had been a person other than the *contractor, the defendants could not have set up the illegality of the contract as an answer to the claim.] [*195

The fifteenth plea, which is pleaded to the third, fourth, fifth, sixth, seventh, and eighth counts, is also bad. The 29th section has no application to the case of a loan of money on debentures; and, if it has, everything has been done that is necessary to give validity to the contract. [ERLE, C. J.—The case of Teversham *v.* Cameron's Coalbrook Steam Coal and Swansea and Lougher Railway Company, 3 De Gex & S. 296, is a distinct authority to show that a loan of money from a director to the company is within s. 29.] There the agreement was a very special one, giving the plaintiff a lien upon the calls, not, as here, an ordinary loan of money on debenture. And no reasons are given for the decision. [ERLE, C. J.—The policy of the legislature was, to prevent the directors from making bargains in which they had a personal interest with the company.] The deed is only evidence of the contract. It might well have been submitted to a meeting of shareholders before its execution. [ERLE, C. J.—The deed is the contract.]

The eighth plea sets up a separate and independent agreement on the part of the plaintiff to guaranty to the shareholders 6 per cent. on the paid up capital. How can that be a condition precedent to the plaintiff's right to sue for the breach of the contract declared on? Christie *v.* Borelly, 7 C. B. N. S. 561 (E. C. L. R. vol. 97), shows that it cannot.

Then, as to the demurrer to the replication to the twenty-fourth plea, —if the whole consideration is not maintained in its integrity, the plea is bad. An accord is one entire thing. The plea alleges that, before action, the defendants satisfied and discharged the plaintiff's claim therein pleaded to by paying him divers moneys and delivering to him divers securities, *&c. To this the plaintiff replies, that the securities were delivered to and accepted by him on the faith of a representation by the defendants that they were valid securities creating a liability on the part of defendants to pay thereunder divers moneys, whereas they were at the time, as the defendants well knew, invalid and worthless. If any one of the things which constitute the bargain turn out to be contrary to the representation, the defendants have not done all that was necessary to constitute an answer to the plaintiff's claim. The mere allegation that the securities turned out to be worthless would not have been enough: Haigh *v.* Brooks, 10 Ad. & E. 309, 323 (E. C. L. R. vol. 37), 2 P. & D. 477, 4 P. & D. 288. But here the replication goes on to allege that the plaintiff agreed to [*196

accept the securities only provided they were valid. [BYLES, J.—Not "provided," but "upon the representation that" they were valid.]

Petersdorff, Serjt. (with whom was *Lucius Kelly*), contrà.(*a*)—This *197] matter has been under the *consideration of Vice-Chancellor Wood, in Re The South Essex Gas Light and Coke Company, Ex parte Stears, 29 Law J. Chan. 43, where the claim of the plaintiff under a contract for the erection of the company's works was disallowed. The Vice-Chancellor there says: "The object of the act clearly was, to prevent persons in the position of trustees from entering into contracts on behalf of their cestuis que trust, in which they were themselves personally interested." And, after reading the 29th section, his Honour continues,—"that must refer to *any* contract entered into by a director *198] by which he shall engage to supply articles to the *company; and the exception only means that he may deal with the company like any other customer, that is, he may buy coals, water, or gas, according to the business of the company." There are also express decisions at law as to the effect of that section. The question was fully discussed in the House of Lords in the case of The Aberdeen Railway Company *v.* Blakie, 1 Macqueen 46, where Lord Cranworth, C., says: "A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the

(*a*) The points marked for argument on the part of the defendants were as follows:—

"1. That, in equity, a director of a joint stock company is incapacitated by the relation in which he stands to the company from entering into any contract with such company in the subject-matter of which he is personally interested, or from deriving any benefit from any such contract, except so far as he may be expressly empowered to do so by the statute law or by the deed of settlement of the company:

"2. That it appears from the 7th, 11th, 15th, and 20th pleas that the contracts sued on were contracts in the respective subject-matters of which the plaintiff was personally interested; and that, there being no statutory provision, nor (so far as appears) any provision in the deed of settlement making them valid, they are void as against the defendants:

"3. That the 29th section of the statute 7 & 8 Vict. c. 110, by prohibiting directors from voting or acting as such on the subject of contracts in which they were concerned or interested, rendered void as against the company all contracts entered into with directors so voting or acting:

"4. That the act made such contracts void in equity, if not at law:

"5. That the 7th, 11th, 15th, and 20th pleas are good in substance, and any answer thereto ought to have come by way of replication:

"6. That it expressly appears from the 8th, 12th, and 21st pleas that the contracts sued on were entered into conditionally on the performance of the terms stated in the pleas:

"7. That the non-performance of the terms and conditions, and the other facts stated in the pleas, constitute good defences to the plaintiff's respective claims therein pleaded to:

"8. That the 8th, 12th, and 21st pleas are good in substance:

"9. That the 24th plea is indivisible; and the fact that the deeds and securities (being only a portion of the things taken in satisfaction) were invalid, is no answer to any part of the plea:

"10. That, for aught that appears to the contrary, the alleged misrepresentation may have been of mere matter of law:

"11. That the replication does not allege that the representation was fraudulent, nor that the accord or satisfaction was conditional on the validity of the deeds and securities:

"12. That the plaintiff's being deprived of the benefit of a portion of the things accepted in satisfaction, is no answer to the plea."

interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the cestui que trust, which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person,—they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted. The English authorities on this head are numerous and uniform. The principle was acted on by Lord King in Keech *v.* Sandford, Cas. Temp. King 61, and by Lord Hardwicke, in Whelpdale *v.* Cookson, 1 Ves. Sen. 8; and the whole subject was considered by Lord Eldon on a *great variety of occasions. [*199
It is sufficient to refer to what fell from that very learned and able judge in Ex parte James, 8 Ves. 337." So, in Ernest *v.* Nicholls, 6 House of Lords Cases 401, it was distinctly held, that there can be no remedy against a company registered under the 7 & 8 Vict. c. 110, on any contract to which a director of the company is a party, and in which he is interested, unless the provisions of the 29th section of that statute have been strictly observed.

As to the eighth and twelfth pleas, it can hardly be contended that they are sustainable. [ERLE, C. J.—Had you not better withdraw the twenty-fourth plea?] It is submitted that that is a perfectly good plea, and that the replication to it is bad. You cannot defeat a plea of accord and satisfaction, which is in its nature indivisible,—Gabriel *v.* Dresser, 15 C. B. 622 (E. C. L. R. vol. 80),—by showing that some portion of that which was given and accepted in satisfaction did not answer the purpose or the expectations of the party receiving it. [ERLE, C. J.—If the replication had been pleaded on "equitable grounds," we think it would have been a good answer to that portion of the plea to which it is pleaded. Let it be so amended.] The replication, it is submitted, discloses no equity. The plaintiff should have offered to restore the money and the securities. [ERLE, C. J.—The equity clearly is that the plaintiff's demand should be cancelled to the extent of the money, but not as to the securities which he was induced by a misrepresentation of their value to accept. It is merely a question of the costs of this small channel of pleading: there is no doubt an issue upon it.]

Temple, in reply.—The case before Vice-Chancellor Wood is not conclusive. [ERLE, C. J.—Independently of that case, my judgment was against you on the main point.] The question of debentures was not *before his Honour. [BYLES, J.—Loans on debentures clearly fall within the words of his judgment.] [*200

ERLE, C. J.—This was an action upon a contract between the plaintiff and the defendants, under which the latter were to pay to the former a given sum of money for the the erection by him of certain gas-works and laying down certain mains and pipes, and also to pay him a certain percentage upon all outlay and contracts on behalf of the company in which the plaintiff should be concerned either as engineer or contractor for them; and there was a further claim for money lent. In respect of each of these claims there is a plea founded upon the 29th section of the

Joint Stock Companies Act, 7 & 8 Vict. c. 110, which enacts, "that, if any director of a joint stock company registered under this act be either directly or indirectly concerned or interested in any contract proposed to be made by or on behalf of the company, whether for land, materials, work to be done, or for any purpose whatsoever, during the time he shall be a director, he shall, on the subject of any such contract in which he may be so concerned or interested, be precluded from voting or otherwise acting as a director; and that, if any contract or dealing (except a policy of assurance, grant of annuity, or contract for the purchase of an article or of service, which is respectively the subject of the proper business of the company, such contract being made upon the same or the like terms as any like contract with other customers or purchasers) shall be entered into, in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose; and that no such contract shall have force until approved and confirmed *201] by the majority of votes of the *shareholders present at such meeting. It appears to me that each of these contracts is within that 29th section. With certain exceptions, the section provides that contracts made by a director with the company shall have no force until approved and confirmed at a meeting of the shareholders: and here there was no such approval and confirmation. The meaning of the section is clear. The directors are trustees on behalf of the general body of shareholders, and as such are bound in all contracts entered into by them for the company to look exclusively to the interests of the company. If a director has a private and personal interest in a contract made with a company, his private interest will conflict with the duty he owes to those whom he represents. The legislature has thought that the private interest might in some instances prevail over the public duty, and therefore has hedged round these contracts with the general provision that they shall be void and of no force unless confirmed and approved at a meeting of shareholders, as before mentioned. The first branch of Mr. *Temple's* argument related to the contract for work and materials to be done for and supplied to the company; and, as to this, he urged that the case did not fall within the 29th section, because the work had been done by the plaintiff, and the company had had the benefit of it, and so the consideration was executed, and that, when the consideration was executed, the company were bound to pay the stipulated price, and the clause in question did not apply. I am of opinion, however, that the 29th section does apply; and I should have come to that conclusion even if the matter were res integra. The contract in which a director is interested is to be of no force unless it receives the required confirmation. The claim here is founded upon a contract falling within that descrip- *202] tion. The contract, therefore, being void, *the action cannot be sustained. This view is confirmed by the decision of the House of Lords in Ernest v. Nicholls, 6 House of Lords Cases 401. I am therefore of opinion that the seventh, eleventh, fifteenth, and twentieth pleas afford a good answer to the first count.

The second count is founded upon a claim for a per centage agreed to be paid by the company to the plaintiff on all outlay and contracts for and on behalf of the company in which the plaintiff should be concerned either as engineer or contractor for them. It has been contended on the

part of the plaintiff that this claim falls within the exception contained in s. 29, and so is taken out of the general provision. The words of the exception are,—"Except a policy of assurance, grant of annuity, or contract for the purchase of an article, or of service, which is respectively the subject of the proper business of the company, such contract being made upon the same or the like terms as any like contract with other customers or purchasers." Is a contract by the company to pay their engineer a per-centage on outlay within that exception? I think not. It is not in the nature of one of the contracts to which "usual terms" could apply; and there is no averment in the count that it is within the exception. And, further, we have the interpretation of Vice-Chancellor Wood in this very case, 29 Law J. Chan. 44, where, after observing that the 29th section "must refer to any contract entered into by a director, by which he shall engage to supply articles to the company," he says: "The exception only means that he may deal with the company like any other customer,—that is, he may buy coals, water, or gas, according to the business of the company." I am, therefore, of opinion that the contract in question is not within the exception; and I also think, that, if *the plaintiff meant to rely upon the exception, he should have averred the contract declared on to be within it. [*203

The third claim is in respect of moneys borrowed by the company on debentures. Are these contracts with the company within the terms of the 29th section? That resolves itself into the question whether a borrowing of money is a contract. The very way of stating the question furnishes the answer to it. Contracts by a joint stock company for the borrowing of money from a director are quite as much within the mischief before adverted to as any other description of contract. With respect, therefore, to all the three grounds of claim, it seems to me that the fact of the plaintiff's being a director deprives him of the power to enforce them. The decree of Vice-Chancellor Wood is impliedly an expression of an opinion to that effect. And the case of Teversham *v.* Cameron's Coalbrook Steam Coal and Swansea and Lougher Railway Company, 3 De Gex & Sm. 296, is a distinct expression of opinion by Vice-Chancellor Knight Bruce that a loan of money to a company is a contract within s. 29. The demurrers, therefore, to the pleas relying on the plaintiff's directorship must be decided in favour of the defendants.

Another ground of defence, viz. that set up by the eighth and twenty-first pleas,—that the company was induced to and did enter into the agreement on the terms and conditions that the plaintiff would guaranty and secure to the satisfaction of the directors of the company the regular payment for ten years to the shareholders of a clear net annual dividend of 6 per cent. on the amount of capital paid up, and that the plaintiff had never given the security or paid any dividend. I am of opinion that those pleas disclose no defence to the action. The contract on *the part of the company to pay the stipulated sums, and that on the part of the plaintiff to give the guarantee and pay the dividends, are independent contracts. The measure of damages for the breach would be very different in each. In the one case the damages might be many thousand pounds; in the other, viz. for failing to give the stipulated guarantee, they might be merely nominal. [*204

Then, as to the twenty-fourth plea,—the accord and satisfaction. The defendants allege that they satisfied and discharged the plaintiff's claim therein pleaded to by paying to him divers moneys and executing and delivering to him divers deeds and securities for money, &c. To this the plaintiff replies, that, as to the deeds and securities they were accepted by him on the faith of a representation by the defendants that they were valid deeds and securities, whereas they were to the defendants' knowledge void. The question is whether that is a good replication. The plea being on equitable grounds, and the replication on equitable grounds, it appears to me that the replication is good. Supposing the plaintiff to claim 1000*l.*, and the defendants to plead an accord and satisfaction by the delivery to the plaintiff of 100*l.* in money, and deeds and securities worth 900*l.*, and an equitable replication, as to the deeds and securities, that the plaintiff had been imposed upon by a representation that they were valid securities, whereas they turned out to be worthless,—the plea clearly would be no good bar in equity as to the 1000*l.*, but the 100*l.* only would be deducted. Credit would be given for that sum, but not for the 900*l.* I therefore think the plaintiff is entitled to judgment on the demurrer to the replication to the twenty-fourth plea, as well as on the demurrers to the eighth and twelfth pleas; but that our judgment must be for the defendants on the demurrers to the other pleas.

*205] *BYLES, J.—I am of the same opinion. In one sense it is not matter of regret that we had not heard of Vice-Chancellor Wood's judgment until we had already formed our opinion upon the rather comprehensive words of the 29th section of the 7 & 8 Vict. c. 110. I think it is quite clear that that section is in affirmance of the ordinary law, that parties who are intrusted with a fiduciary character shall not deal with those whom they represent. Thus, trustees, executors, assignees of bankrupts, and mortgagees in trust for sale, are prohibited from dealing with their cestuis que trust in respect of property so held by them in trust. So also is the law with respect to principal and agent and attorney and client. At all events, the 29th section is in affirmance of the common law, and should be read liberally. The terms of it show that such was the intention of the legislature. It provides that, "if any contract or dealing" (with certain exceptions which do not apply here) "shall be entered into in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose; and that no such contract shall have force until approved and confirmed by the majority of votes of the shareholders present at such meeting." If a director is interested in any contract made with the company, such contract is of no force unless it has been approved and confirmed in the manner pointed out. I must confess I do not feel the force of Mr. *Temple's* distinction between contracts on executory and those on executed considerations: they seem to me all to fall within the mischief which the section was pointed at. Here, it is true, the plaintiff is one of several directors. But, we may conceive a case where he might be a sole surviving director, or where there were two or three surviving di-

*206] rectors all *having the same interest in the contract; could it be allowed in such a case,—where there would be no one to look after the just interests of the company,—that the contract should be

held valid, independently of the statute? However, here the contract is beyond all doubt within the intention and within the terms of the 29th section, which was meant to embrace contracts of every sort except those specially excepted. Mr. *Temple* relies upon the general allegation of performance of all conditions precedent in the declaration. But that averment is made with reference to a contract which as stated in the declaration has no vice. As to the replication on equitable grounds to the twenty-fourth plea, I agree with the rest of the court that the plaintiff is entitled to our judgment. Where one has by misrepresentation induced another to enter into a contract into which but for such misrepresentation he would not have entered, whether the misrepresentation were wilfully made or a mere mistake, equity will, I conceive, give relief. The result is, that our judgment upon the whole record, except as to the demurrers to the eighth and twelfth pleas and the demurrer to the replication to the twenty-fourth plea, will be for the defendants.

KEATING, J.—I entirely concur in the opinion given by my Lord and my Brother Byles. There was one argument urged by Mr. *Temple* to which I wish to advert, viz. that, if the approbation and confirmation of a meeting of the shareholders was required, the plaintiff was not bound to allege that such approbation and confirmation had been obtained, but that the defendants, as having the better knowledge on the subject, should have negatived it. But I apprehend that that argument is met by the very terms of the 29th section, which provides that "no such contract *shall have force *until* approved and confirmed by the majority [*207 of votes of the shareholders," &c. I am therefore of opinion that it lies on the plaintiff to show that the contract was one which was capable of being enforced. It was also urged that the resolutions which preceded the contract were a sufficient affirmation by the shareholders of their approbation of it. But I am of opinion that those resolutions are not equivalent to a subsequent approbation: they might have been entered into by a totally different set of persons. I also agree with my Brother Byles, that, on equitable grounds, the replication negativing a portion of the consideration would be a good answer in equity to the twenty-fourth plea.

Judgment for the plaintiff on the demurrers to the eighth and twelfth pleas and to the replication to the twenty-fourth plea; and judgment for the defendants on the demurrers to the seventh, eleventh, fifteenth, twentieth, and twenty-first pleas.

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*ROBERTS, Appellant; PRESTON, Respondent. *Nov.* 14. [*208

Upon an information before justices on behalf of a railway company, for an offence against their act of incorporation, in placing stones and rubbish on the railway, and thereby obstructing the free passage of the same, the evidence was that the act was done by certain persons employed by the defendant to repair a wall between the railway and his premises adjoining, and that on one occasion the defendant himself, who was standing by, nodded his head and directed the workmen to go on:—Held, on appeal under the 20 & 21 Vict. c. 43, s. 2, that there was evidence to warrant the justices in convicting the defendant.

Held, also, that the person lodging the complaint on behalf of the company was properly made the respondent in the appeal.

AN information was laid on the 31st of August, 1860, on behalf of the Nantlle Railway Company, under the Nantlle Railway Company's Act, 6 G. 4, c. lxiii., intituled, "An Act for making and maintaining a railway or tramroad from or near a certain slate quarry called Cloddfarlon, in the parish of Llanwrog, in the county of Carnarvon, to the town and port of Carnarvon, in the same county, against Robert Robert Roberts, of Carnarvon, in the said county, flour dealer. The following is a copy of the information, upon which a summons was issued and served upon the said Robert Robert Roberts on the said 31st of August, to appear at the grand jury room, Carnarvon, before the justices, on Saturday, the 1st of September instant, to answer the said information:—

"The information of Edward Preston, of Carnarvon, in the said county, taken on oath before me, the undersigned, one of Her Majesty's justices of the peace for the said county, this 31st day of August, 1860, who saith that Robert Robert Roberts, of Eastgate Street, Carnarvon, flour dealer, did, on the 28th of August instant, throw stones and rubbish upon a part of the Nantlle railway, and wilfully obstructed the company's agent in the execution of the Nantlle Railway Act, and obstructed the free passage of the railway, contrary to the statute in that case made and provided."

The following is the section of the act upon which the information was laid: "And be it further enacted, that, if any person shall throw any gravel, stones, or rubbish, or any matter or thing upon any part of the
*209] said railway or tramroad to be made by virtue of this act, *or shall wilfully obstruct, hinder, or prevent any person in the execution of this act, or shall do any other act, matter, or thing to obstruct the free passage of the said railway or tramroad, or any part thereof respectively, every person so offending in any of the cases aforesaid shall forfeit and pay for every such offence any sum not exceeding 10*l.*"

The said Robert Robert Roberts is the owner of certain premises adjoining the railway, called Bryn Helen. Roberts with his solicitor appeared before Charles John Sampson and Charles Millar, Esquires, two of Her Majesty's justices of the peace for the said county, on the 1st of September, when the following evidence was entered into:—

Edward Preston: "On Tuesday last, about ten o'clock in the morning, I met Robert Robert Roberts by the office. He asked me if I would allow him to place some stones upon the railway to build up the wall. I stated I could not; but I thought if he applied to the company they would repair it for him. I went to the railway about three o'clock in the afternoon, and saw masons at work between the rail and the fence wall. There were stones placed. They were so close to the rail that I was afraid the train would be thrown off the rails. The driver of the tram walked past the spot. I ordered the men to leave the ground. I ordered the stones to be removed, and an account to be kept."

Cross-examined: "An action has been brought against me."

Owen Ellis: "I went with Mr. Preston on Tuesday last to the fence wall: there were men working. Mr. Preston told the men to go away; when Robert Robert Roberts said, in Welsh, the men should proceed. There were stones on the railway. One stone was within three inches of the rail; they were all between the rail and the wall, a space of

eighteen inches: *there were two heaps of stones. I kept an account of the stones. Forty stones were taken off the line and thrown over, and three pieces of slate." [*210

Cross-examined: "None of the forty stones were taken off the wall by Mr. Preston's men: they were stones taken from the wall previously, and then thrown over. Mr. Preston told the men to go away. A man made an attempt to measure the distance. Mr. Preston did not lay hold of the man. The stone that was within three inches was not thrown there by a squabble between Preston and the man. Some of the stones were as near the wall as they could be. I did not see any of the men placing the stones. There were some loose on the wall. Some of the men were at it building. Roberts was on the premises at Bryn Helen, behind the wall. After Mr. Preston had told the men to go away, Roberts said in Welsh to the men, 'Go on,' and nodded."

Re-examined: "The stones that were on the wall were not 'built in' stones. I saw Roberts on the railway as I was going there: and, when we got there, he went through the door, and stood on his own ground."

Joseph M'Carter: "I am a driver on Nantlle Railway, and drove a train last Tuesday, and saw stones on the line under Bryn Helen. If I had seen stones on any other part of the line I would have slackened my speed. I slackened my speed there."

Alexander Marshall: "I was on the railway by Bryn Helen on Tuesday. There is a small water table there. There is not more than enough room for vehicles: about eighteen inches between the rail and the wall. There was one stone close to the rail which was dangerous. I saw stones upon the railway."

Cross-examined: "It is possible that John Jones was standing, when the train was passing, between the rail and wall. It was the closest part of the line. I should not like to have stood there."

*This closed the examination in support of the information: and no evidence was given or tendered on behalf of Roberts. [*211

Mr. Willliams, solicitor for Roberts, contended that there was no evidence whatever in support of the information to fix him, Roberts, with any of the allegations in the information. The justices convicted Roberts in the sum of 10*s.* and costs; when Williams applied in writing to them to state and sign a case setting forth the facts and the grounds of their determination, for the opinion of the Court of Common Pleas.

Aspland, for the appellant.—One of the points intended to be urged on the other side, is, that the Nantlle Railway Company should have been made respondents here, and not Preston. But, if that were any ground of objection, the proper course would have been to apply to strike out the appeal. Besides, it is clear that Preston alone could have been the informant. As long ago as the case of The Weavers' Company *v.* Forrest, 2 Stra. 1241, it was held that a corporation cannot sue as common informers. There are many cases which show that the information need not be laid by the party grieved himself, unless the penalty is given to him only: see Middleton *v.* Gale, 8 Ad. & E. 155 (E. C. L. R. vol. 35), 3 N. & P. 372.(*a*) [ERLE, C. J.—Is this a question that is reserved to us by the justices?]

Brown, contrà.(*b*)—The 2d section of the 20 & 21 Vict. c. 43, under

(*a*) And see Morden, app., Porter, resp., 7 C. B., N. S. 641 (E. C. L. R. vol. 97).

(*b*) The points marked for argument on the part of the respondent, were as follows:—

*212] which this case comes before the *court, enacts, that, "after the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way, by any law now in force or hereinafter to be made, *either party to the proceeding* before the said justice or justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of one of the superior courts of law to be named by the party applying." Here, the Nantlle Railway Company were the parties grieved, and the notice of appeal should have been given to them. [ERLE, C. J.—Your argument would have been more tenable if the penalty or part of it went to the party grieved. The justices here dealt throughout with Preston as the real party. There is nothing in the objection.]

Aspland.—Then, as to the merits,—in order to sustain this appeal, the appellant must show that the decision of the justices was erroneous in point of law; or, in other words, that there was *no* evidence to support the conviction, that is, none upon which the justices ought reasonably to have acted: Cuthbertson, app., Parsons, resp., 12 C. B. 304 (E. C. L. R. vol. 74); The British Industry Life Assurance Company, app., Ward, resp., 17 C. B. 644 (E. C. L. R. vol. 84). The judgment of Maule, J., in the first-mentioned case shows the true principle. "No doubt," he says, "if it could have been made to appear, by any *213] *inference of fact that could legitimately be drawn from the evidence submitted to us, that the judgment of the county court might be as it is without any miscarriage in point of law on the part of the judge, that judgment must be left undisturbed, notwithstanding this court might incline to draw inferences from the facts which might not consist with the conclusion which he has come to. But we feel no difficulty whatever in saying that, drawing any inferences that could legitimately be drawn from the evidence here set forth, the judgment for the respondent could not have been arrived at without error in point of law, —that is to say, that the judge of the county court, in deciding that there was any evidence to warrant him in holding the appellant liable in point of law for the injury complained of, must necessarily have been wrong." Here, the evidence does not show that the appellant was personally guilty of anything to bring him within the act. All that was done was done by his agents. The only shadow of evidence against him, was, that, on one occasion, he was standing by. [BYLES, J.—And that he directed his men to go on, and nodded.]

ERLE, C. J.—Looking at all the facts set out in the case, we are all satisfied that the conviction was right. There was clear evidence to fix the appellant. Appeal dismissed, with costs.

"That the testimony of the witnesses set out in the case was evidence of the offence charged against the appellant; and that the magistrates were the sole judges of the *weight* of the evidence: That the evidence proved the offence: That no point of law was raised for the appellant, or decided by the magistrates, and therefore no appeal lies: And that the Nantlle Railway Company, and not the respondent, were the informers before the magistrates, and that notice of appeal should have been given to them; and that the appeal does not lie against Edward Preston."

*SMITH and Others *v.* VERTUE and Another. *Nov.* 24. [*214

A bill was accepted by the defendants,—"Payable on giving up bill of lading for 76 bags of clover-seed per Amason, at the London and Westminster Bank, Borough Branch:"—Held, that this was a conditional acceptance to this extent, that the holders were only entitled to receive the amount on delivering over to the acceptors the bill of lading; but that they were not bound to present the bill on the precise day on which it became due.

THE first count of the declaration stated that certain persons using the name, style, and firm of T. B. Sands & Co., on the 24th of December, 1859, in parts beyond the seas, to wit, at New York in the United States of America, by one J. A. Edwards, their agent in that behalf, made their bill of exchange in writing, and directed the same to the defendants by the name, style, and firm of Messrs. Vertue & Sons, and thereby required the defendants to pay to the order of themselves the said T. B. Sands & Co., sixty days after sight, in London, 228*l.* 3*s.* 5*d.*, which period had elapsed before the commencement of this suit; and the defendants, so using the name, style, and firm of Vertue & Sons, accepted the said bill, payable, on giving up a bill of lading for 76 bags of clover-seed per Amazon, at the London and Westminster Bank, borough branch; and the said T. B. Sands & Co., by their aforesaid agent in that behalf, endorsed the said bill to a certain person or certain persons using the name, style, and firm of John Stewart & Co., or to his or their order; and the said person or persons so using the name, style, and firm of John Stewart & Co., endorsed the said bill to the plaintiffs; and though all things had happened and had been done, and all times had elapsed, to entitle the plaintiffs to have the said bill paid by the defendants, yet the defendants had not paid the same.

There was also a count for money payable to the plaintiffs by the defendants for money found to be due from the defendants to the plaintiffs on accounts stated between them: claim, 300*l.*

First plea,—to the first count,—that the plaintiffs were not ready and willing to give up the said bill of *lading in the declaration and in the defendants' said acceptance mentioned, as alleged. [*215

Second plea,—to the first count,—that the drawers of the said bill had contracted to sell to the defendants the said clover-seed in the first count mentioned, and had shipped the same on board a ship called the Amazon, under the bill of lading in the said first count mentioned, and that the defendants accepted the said bill of exchange, being the bill in the first count mentioned, in payment of the price of the said clover-seed; that, after their said acceptance, and before maturity of the said bill of exchange, the defendants contracted to sell a large portion of the said clover-seed to certain persons, the said last-mentioned contract of sale to be performed by the defendants by delivery to the said persons on or before the said 14th of March, 1860, being the day on which the said bill should become due: That on the said 14th of March, 1860, being the day on which the said bill of exchange became due and payable, and from thence until the expiration of a reasonable time after the said last-mentioned day, they, the defendants, were ready and willing to pay the same according to the tenor and effect of their said acceptance thereof, and then, on the said day, during business hours, demanded the said bill of lading of the plaintiffs, then being holders of the said bill of exchange, and possessed of the said bill of lading, and offered

the plaintiffs to pay the said bill of exchange on giving up the said bill of lading, but the plaintiffs then neglected and refused to give up the said bill of lading, nor did nor would the plaintiffs deliver up to the defendants the said bill of lading till after the expiration of a reasonable time for delivery of the said bill of lading after the said day on which the said bill of exchange became due, or until after the said persons to whom the defendants had so contracted to sell the said portion
*216] of the said clover-seed had repudiated *their said contract on account of the inability of the defendants to obtain the said bill of lading, or to deliver the said portion of the said clover-seed so contracted to be sold to the said persons; whereby the defendants were deprived of the benefit and profits of their said contracts, and the said bill of lading by the said default of the plaintiffs became and was deteriorated in value, wherefore the defendants refused to accept the said clover-seed or bill of lading or pay the said bill of exchange.

Third plea,—to the residue of the declaration,—never indebted.

The plaintiffs joined issue on the first and third pleas, and demurred to the second, the ground of demurrer stated in the margin being, that the time at which the bill of lading was tendered had no connection with the liability of the defendants to pay upon their acceptance to the bill of exchange in the declaration mentioned. The defendants joined in demurrer.

The cause came on for trial before Erle, C., J., at the sittings in London after the last term, when the following facts appeared in evidence:—The plaintiffs were bankers in London, and the defendants seed merchants carrying on business in Southwark. The bill of exchange upon which the action was brought was in the following form:—

£228. 3*s.* 5*d.* sterling. New York, Dec. 24, 1859.

"Sixty days after sight of this first of exchange (second and third unpaid) pay to the order of ourselves in London two hundred and twenty-eight pounds, three shillings, and five pence sterling, value received, which place to the account of clover-seed per Amazon.

London, Jan. 11, 1860. Accepted, payable on giving up bill of lading for 76 bags of clover-seed per Amazon, at the London and Westminster Bank, Borough Branch. VERTUE & SON.

"T. B. SANDS & Co.,
"Per J. A. EDWARDS, attorney."

"To Messrs. Vertue & Son,
"High St., Borough, London."

*217] *On the back of the bill were the following endorsements:—

"Pay Messrs. John Stewart & Co., or order.
"T. B. SANDS & Co.,
"Per J. A. EDWARDS, attorney."

"Pay Messrs. Smith, Payne & Smiths, or order.
"JOHN STEWART & Co."

Messrs. Stewart & Co., who were American merchants residing at Manchester, and who banked with Messrs. Smith, Payne & Smiths, on the 27th of February, 1860, sent the bill of exchange in question with the bill of lading for the 76 bags of clover-seed annexed to it, to the plaintiffs, with instructions "to receive payment under discount, when

called for;" and on the same day Stewart & Co. informed the defendants that the bill was at the plaintiffs' bank, and directed them to apply there when they wanted to take it up.

The bill arrived at maturity on the 14th of March, 1860, but was not presented for payment. If it had been, it would have been duly honoured. No inquiry was made by the defendants respecting the bill until the 15th of March, when one of the defendants called at Smith, Payne & Smiths, and asked why it had not been presented. It did not appear what answer he received; but, the bill being then presented to him, with the bill of lading annexed, he refused to accept the latter or pay the former, saying that he had entered into a contract to ship the seed on that day to Scotland, and it was then too late to do so.

The bill was presented at the Borough branch of the London and Westminster Bank on the same day (with the bill of lading annexed), and refused payment; whereupon this action was commenced.

Upon this state of facts, the Lord Chief Justice *directed a verdict to be entered for the plaintiffs, reserving leave to the defendants to move to enter a verdict for them. [*218

Montague Smith, Q. C., on a former day in this term, obtained a rule nisi accordingly. He submitted that time was the essence of the contract, that the delivery of the bill of lading to the defendants was a condition precedent to the holders' right to demand payment of the bill, and that that condition was not performed within the stipulated time.

It was arranged that the argument of the rule and on the demurrer should come on together.

Bovill, Q. C., and *Coleridge*, for the plaintiffs.(*a*)—The first question is, what is the effect of the defendants' acceptance,—"payable on giving up bill of lading for 76 bags of clover-seed per Amazon, at the London and Westminster Bank, Borough Branch?" Is it a conditional acceptance, or an absolute acceptance, the payment being conditional? It is submitted that it falls within the latter description, and that the defendants are liable. Ever since the statute 1 & 2 G. 4, c. 78, which was consequent upon the decision of the House of Lords in Rowe *v.* Young, 2 Brod. & B. *165 (E. C. L. R. vol. 6), 2 Bligh 391, the mere addition of a place of payment is no qualification of the acceptance, unless the words "and not otherwise or elsewhere" be superadded. Here, the added words do not qualify or cut down the generality of the acceptance; the only qualification being as to the particular proceeds out of which the amount is to be paid. Assuming that this acceptance was a conditional one, it became absolute upon the condition being performed. In Bayley on Bills, 6th edit. 198, it is said: "A conditional acceptance becomes absolute as soon as its conditions are performed. Thus, an answer by the drawee that he could not accept until a navy bill should be paid, was thought (Pierson *v.* Dunlop, Cowp. 571) to [*219

(*a*) The points marked for argument on the part of the plaintiffs on the demurrer were as follows:—

"That, as the acceptor of a bill of exchange is liable to pay it at all times within six years, there is nothing disclosed in the plea to vary this general rule, or prevent its operation in this case:

"And that the obligation on the part of the plaintiffs, if it existed at all, to deliver the bill of lading mentioned in the plea, had no connection with the duty of the defendants to pay the bill upon their acceptance, so as to relieve the defendants from their duty if it was not delivered in a reasonable time."

operate as an absolute acceptance upon the payment of the navy bill. So, an answer that the bill would not be accepted till certain goods against which it was drawn arrived, was held virtually an acceptance when they did arrive and were received: Miln *v.* Prest, Holt 181 (E. C. L. R. vol. 3), 4 Campb. 393." The law is laid down substantially in the same way in Byles on Bills, 7th edit. 165. In a case of Storm *v.* Garnons, tried before Erle, J., at Guildhall, on the 22d of February, 1848, a bill accepted payable at Messrs. Fuller & Co.'s on delivery of "the shipping documents," was held to be an absolute acceptance. If the acceptance was absolute, no presentment was necessary; for, the acceptor is bound to be ready at all times to pay the bill. And, if conditional, the condition was satisfied by the offer of the bill of lading on the following day, and the plaintiffs were entitled to the money. If it were a question for the jury, it must be taken that the jury have found for the plaintiffs. If the acceptance be absolute, then the second plea affords no defence at law, for it is immaterial whether the plaintiffs did or did not sustain prejudice from the non-presentment of the bill on the
*220] *day it became due. There is no principle of law, and nothing upon the face of the document itself, to show that the presentment and delivery up of the bill of lading were to take place at any particular time. To make the plea at all available, it should have averred a positive and absolute refusal to perform the condition.

Montague Smith, Q. C., and *Hannen*, contrà.(*a*)—This was clearly a conditional acceptance. The ordinary sense of the words implies a condition. The argument derived from the statute is in the defendant's favour: it required the interference of the legislature to get rid of the conditional effect of an acceptance making a bill payable at a particular place. In Byles on Bills 165, it is said: "Qualified acceptances are of two kinds,—first, *conditional*,—and secondly, *partial*, or *varying* from the tenor of the bill. Whether an acceptance be conditional or not, is a question of law: Sproat *v.* Matthews, 1 T. R. 182. Acceptances, 'to pay as remitted for' (Banbury *v.* Lisset, 2 Stra. 1211), 'to pay when in cash for the cargo of the ship Thetis' (Julian *v.* Shobrooke, 2 Wils. 9),' 'to pay when goods consigned to him (the drawee) were sold' (Smith *v.* Abbot, 2 Stra. 1152), an answer that a bill would not be
*221] *accepted till a navy bill was paid (Pierson *v.* Dunlop, Cowp. 571), have respectively been held to be conditional acceptances." In none of those cases were the words so strongly conditional as are the words here. In Swan *v.* Cox, 1 Marsh. 176 (E. C. L. R. vol. 4), A., in June, 1811, agreed to purchase a house of B. for 1000*l.*, paying 300*l.* down; full possession to be given by the 1st of June, 1812. B. was arrested in June, 1811, on which A. accepted a bill for B. in favour of B.'s creditors, *payable if the house should be given up on the 1st of June*,

(*a*) The points marked for argument on the part of the defendants on the demurrer were as follows:—

"1. That the acceptance of the bill as stated in the declaration rendered it obligatory on the holders to be in a position to give up the bill of lading on the day the bill of exchange fell due:

"2. Or that, at any rate, the holder, by refusing to deliver up the bill of lading till after the expiration of a reasonable time beyond the day it fell due, discharged the acceptors from liability to pay:

"3. That the damage to the acceptors stated in the plea, caused by the act of the holders, exonerates them from liability to pay."

1812. At B.'s request, A. put his nephew into the house to take care of it while B. remained in custody. B., having a bad title to the house, gave up all claim to it, and A. purchased it of the real owner, being allowed the 300*l.* which he had paid to B. And it was held that the possession which A. had of the house from B. was not such a compliance with the condition of the acceptance as to support an action by the holder of the bill against A. In Story on Bills, § 239, it is said: "An acceptance is general when it imports an absolute acceptance precisely in conformity to the tenor of the bill itself. It is conditional or qualified when it contains any qualification, limitation, or condition different from what is expressed on the face of the bill, or from what the law implies upon a general acceptance. It is conditional, for example, when the drawee accepts a bill 'to pay when goods conveyed to him are sold,' or 'when in cash for the cargo of the ship A.,' or 'to accept when a navy bill is paid,' or 'to pay as remitted from thence, at usance.' And the condition may be implied from circumstances, as well as expressed. It is qualified when the drawee absolutely accepts the bill, but makes it payable at a different time or place, or for a different firm, or in a different mode from that which is in the tenor of the bill." And for this Story refers to the *cases cited in Byles. In Turner *v.* Hayden, [*222
4 B. & C. 1 (E. C. L. R. vol. 10), 6 D. & R. 5 (E. C. L. R. vol. 16), R. & M. 215 (E. C. L. R. vol. 21), where the holder of a bill of exchange accepted payable at a banker's, but not made payable "there only," did not present it for payment, and the banker about three weeks afterwards failed, having had in his hands during all that time a balance in favour of the acceptor exceeding the amount of the bill,—it was held that the latter was not discharged by the omission to present the bill for payment, the acceptance being in law a general acceptance. Abbott, C. J., there says: "In Sebag *v.* Abitbol, 4 M. & Selw. 462, Lord Ellenborough thus defines laches,—'Laches is a neglect to do something which by law a man is obliged to do:' and he proceeds,—'Whether my neglect to call at a house where a man informs me that I may get the money amounts to laches, depends upon whether I am obliged to call there.' Now, the law did not oblige this plaintiff to present the bills at Marsh & Co.'s; we cannot, therefore, say that he has been guilty of laches because he omitted to do so." And Bayley, J., adds: "The 1 & 2 G. 4, c. 78, says that such an acceptance as that given by the defendants shall have the effect of a general acceptance, and then the holder is not bound to present the bills at any particular time or place." That implies that it would be otherwise if the acceptance were conditional. Marshall *v.* Powell, 9 Q. B. 779 (E. C. L. R. vol. 58), is to the same effect. Time is in general of the essence of the contract, whether it be a contract for the sale of land or for any other purpose: Sugden's Vendor and Purchaser, 13th edit. 216. The whole law upon the subject of conditional or qualified acceptances is considered very minutely in the case of Rowe *v.* Young, 2 Brod. & B. 165 (E. C. L. R. vol. 6), 2 Bligh 391. Best, C. J., there says (2 Brod. & B. 181): "It cannot be disputed that the drawee of a bill may accept it specially; and that such an acceptance may narrow his *responsibility below what it [*223
would have been if he had accepted the bill according to its tenor. Special acceptances are recognised by a long series of decisions of all the courts of Westminster Hall, from which it appears that the

drawee of a bill may limit his responsibility by any conditions which his own circumstances or the situation of the drawer's funds may render expedient. In Smith v. Abbott, 2 Stra. 1152, it was holden that a drawee may accept payable when certain goods consigned to him are sold: and in Julian v. Shobrooke, 2 Wils. 9, when in cash from the cargo of the ship Thetis. In Walker v. Attwood, 11 Mod. 190, a bill payable at sight was accepted payable three months after acceptance; and this was held to be a good conditional acceptance. If the time of payment may be postponed, the place of payment may be changed. It is another question whether the holder is bound to take such an acceptance, and whether, if he take it without giving notice to the drawer and endorsers, and obtaining their assent, he does not discharge them from all liability: but, if he does receive such an acceptance, he is bound by the terms of it, as between himself and the acceptor." Then, assuming this to be a conditional acceptance, has the condition been performed? It is submitted that it has not. The day was a material part of the transaction. [BYLES, J.—What is the meaning of the acceptance? Is it not this,—"I will pay the amount mentioned in the bill on the day on which it becomes due, or on any day on which the holder chooses to accept it within six years?"(a)] Here, something was to be done for the acceptor's benefit before he could be asked for payment of the bill. This, it is said, on the part of the plaintiffs, is to be done within a rea-
*224] sonable time. *But that cannot be; for what is a reasonable time is to be determined by the court or the jury only in those cases where the time for the performance of the act is not fixed and ascertained by the parties themselves. Here, the time is fixed by the contract: and the court is not asked to construe it, but to make a new contract. [ERLE, C. J.—Before the case of Rowe v. Young, was it a condition that the bill should be presented on the very day of its maturity?] Yes. Such is the result of Lord Eldon's judgment in that case: 2 Brod. & B. 167 (E. C. L. R. vol. 6), 2 Bligh 395. [ERLE, C. J.—I do not collect that from his judgment.] If the defendant's contention is not correct, where is the limit? The cause of action does not arise until the bill of lading is delivered. The real question arises upon the first plea. If the day is material, the issue upon that plea must be found for the defendant. As to the demurrer, assuming the facts alleged in the second plea to be true, they clearly afford a defence. If reasonable time be the test, that must be found for the defendants. But it is submitted that time is material, according to the contract of the parties.

ERLE, C. J.—The question raised for our consideration in this case, is, whether the plaintiffs are entitled to recover against the acceptors upon a bill of exchange accepted in these terms,—"Accepted payable on giving up bill of lading for 76 bags of clover-seed per Amazon, at the London and Westminster Bank, Borough Branch,"—the material fact being that the bill was not presented on the day it became due, but was presented (together with the bill of lading) on the following day, when it was refused payment; the acceptors contending that under these circumstances they are not liable. I am of a contrary opinion. Accord-
*225] ing to the view I take of the case, the matter to be decided *is, the meaning of the acceptance. I am clearly of opinion that it

(a) See Laws v. Rand, 3 C. B., N. S. 442 (E. C. L. R. vol. 54).

is a conditional acceptance, and that the defendants could not be called on to pay the amount unless the bill of lading were at the same time handed over to them. But they have insisted that the acceptance is subject to this further qualification, viz., that the presentment shall take place on the very day of the maturity of the bill, and, that condition not having been fulfilled, that they are wholly discharged from liability upon their acceptance. Now, I do not so construe the words of qualification which the defendants have attached to their acceptance. Was it in their power so to stipulate? They might have said, "Accepted, payable if on the day on which this bill becomes due the bill of lading for the clover-seed per Amazon is delivered up." If that had been the form of the acceptance, the contention on the part of the defendants might have been right. The question here is, not what was the duty of the holders of this bill, but what was the contract of the acceptors. As a general rule, the contract of the acceptor of a bill of exchange is, to pay the sum therein specified on the day on which the bill falls due or on any future day (of course within the period prescribed by the statute of limitations) upon which the holder may choose to call upon him for payment. That being so as to a general acceptance, many of the cases where the acceptance has been held to be qualified fall within the same category: as, for instance, where the acceptor by his acceptance undertakes to pay the amount specified in the bill when he shall be in funds from a certain cargo, or when goods consigned to him have been sold, or the like. In all those cases, I am inclined to think, that, where the acceptor intended the holder to understand that his liability to pay was to be postponed until the contemplated funds came to his (the *acceptor's) hands, the contract did not stipulate for a present- [*226 ment on any particular day; but that, under a contract so qualified, the acceptor would be bound to retain the funds in his hands for some time at least during which the holder might have recourse to him. I think the holder would not be bound to go to the acceptor on the particular day on which the funds came to his hands: he might not have notice of the fact at that time. I cannot help feeling that there is much force in the argument urged by the defendants' counsel, that here the condition is one which is to be performed by the holder of the bill, viz., the delivery of the bill of lading for the clover-seed. No doubt, in a contract for the purchase of a cargo, time may frequently be of the very essence of the bargain; and the buyer may very well say, as is said in the second plea here, "I accepted the bill upon the faith of the goods for the price of which the bill was drawn being delivered on the day my acceptance became due; and, upon the faith of that contract, I contracted to resell the goods, but, in consequence of the non-presentment of the bill and the non-delivery of the goods, I was unable to fulfil my bargain." But, upon the whole, I do not think that authorizes me to hold that the language in which these defendants have clothed the qualification of their acceptance amounts to that which they contend for, viz., "I will pay you the amount provided you on the day on which the bill becomes due present it at the London and Westminster Bank, and then deliver up the bill of lading." The conclusion, therefore, which I have come to, is, that the construction which we are bound to put upon this qualified acceptance is such as to entitle the plaintiffs to judgment.

*227] BYLES, J.(a)—I am of the same opinion. I do not *agree with the counsel for the plaintiffs in the first point urged by them, that this is not a conditional acceptance. For more than forty years the law has required that the acceptance of a bill of exchange shall be in writing: and, for the last three or four years, it has also required that it shall be signed. Any form of words which intimates that the drawee intends to pay is a sufficient acceptance,—that is, anything in writing and signed by the party. The simple meaning of an acceptance is, "I will pay the bill at maturity." Such being the meaning of the word "accepted," what is meant by "accepted, payable on giving up bill of lading for 76 bags of clover-seed per Amazon?" I think it is impossible to contend that it is not a conditional acceptance,—a thing which may well be by our law, though it is otherwise by the law of France. This being, then, a conditional acceptance, it is said that the condition is not complied with unless the holders hand over to the acceptors the bill of lading referred to on the very day the bill becomes due. It seems to me that that is not so, but that the qualification is only co-extensive with the defendants' obligation. As between the holders and the drawees, that obligation exists for six years at least, and possibly, but for the limited duration of human life, and other necessary limitations, it is perpetual. It therefore simply comes to this,—the obligation of the acceptors to pay the amount mentioned in the bill is suspended until the holders are prepared to hand over to them the bill of lading for the clover-seed. That seems to me to be the reasonable construction of this qualified acceptance; and I entirely agree with my Lord in thinking, that, if the drawees of this bill intended that the bill of lading should be delivered up to them on the very day on which the bill became *228] due, and on no other day, it would have been easy so to *have expressed themselves. As they have not thought fit to do so, we must assume that the general common-law obligation of the defendants is suspended only upon the condition which they have expressed.

KEATING, J.—I am of the same opinion. I think it is most important that the qualification of an acceptance should not be extended beyond the precise terms in which it is expressed. If there had been anything to justify the argument urged on the part of the defendants, that an acceptance in such terms as are used here required that the condition should be performed on the very day the bill became due, it is not unreasonable to expect that some authority would have been found to warrant it. But the research of the learned counsel has not enabled them to produce any such case; and the expressions of Lord Eldon in his judgment in Rowe v. Young do not in my judgment at all support the notion, that, where an acceptance is qualified as to the place at which the presentment is to be made, the non-presentment at that place on the day on which the bill becomes due discharges the acceptor. For these reasons, I think the rule should be discharged.

ERLE, C. J.—There will also be judgment for the plaintiffs on the demurrer to the second plea.

Judgment for the plaintiffs on the demurrer.

Rule to enter the verdict for the defendants discharged.

(a) Williams, J., was engaged in the Court of Criminal Appeal.

*In the Matter of the Arbitration between BROGDEN and Others and THE LLYNVI VALLEY RAILWAY COMPANY. *Nov.* 7. [*229

A railway company were empowered by their act of parliament to abandon certain tramways which communicated with certain iron-works of A.; and, they having given A. notice under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), of their intention to take certain of his lands, the amount of compensation was referred to an umpire, who was to ascertain and direct what should be paid "for the interest in the lands, and for any damage that might be sustained by reason of the execution of the works."

A. made a claim before the arbitrator for compensation in respect of damage which he alleged he would sustain if the tramways were stopped up: and the umpire awarded that a certain sum should be paid by the company to A. "as and for purchase and compensation for and in respect of his interest in the said lands and hereditaments, and for damage sustained and which may be sustained by him by reason of the execution of the works of the said railway, or the exercise by the said company of the powers of the said act:"—

Held, that it did not appear upon the face of the award that the umpire had exceeded his jurisdiction by awarding compensation in respect of a claim for damage not within the reference.

Quære, whether the award would have been bad if it had appeared that the arbitrator had given compensation for contingent damage which might arise from the exercise of the powers of the act?

BOVILL, Q. C., in Easter Term last, obtained a rule on behalf of the Llynvi Valley Railway Company, calling upon Messrs. Brogden to show cause why a certain award made between the parties should not be set aside, on the grounds that the arbitrator had included therein compensation for the power to abandon and possible future abandonment of the tramways, and that this appeared on the face of the award, or ought to have been so stated by the said umpire,—that the power to abandon the tramways was not the subject of compensation at the time of the submission, and that the umpire had exceeded his powers with respect to compensation for the power to abandon the tramways,—that the abandonment of the tramways would not give the Messrs. Brogden a right to claim or the umpire a right to award compensation,—that, at all events, compensation could not be awarded until the tramways were abandoned and injury sustained thereby,—and that the award was bad, being beyond the submission.

The affidavits upon which the application was founded alleged in substance as follows:—Before and in the year 1855, the Messrs. Brogden, as occupiers of *certain iron-works called the Tondu Works, had [*230 the use of two public tramways for horse power, with a narrow gauge,—one from a place called Tywith to Porth Cawl, and the other from a place called Bridgend to Porth Cawl. In 1855, an act (18 & 19 Vict. c. l.) passed, empowering The Llynvi Valley Railway Company to construct a railway for steam-power, with a broad gauge, nearly in the course of the two tramways. The 53d and 54th sections of the act gave the company the option of abandoning the tramways, subject to an exception as to part of one of them in favour of Messrs. Brogden. The company requiring certain parcels of land of Messrs. Brogden for the purposes of their railway, gave them the requisite notices under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, of their intention to take the same; and, the parties not being able to agree as to the amount of compensation to be paid for it, an umpire was appointed pursuant to the provisions of that statute.

At the hearing before the umpire, the Messrs. Brogden claimed compensation not only for their interest in the land to be taken under the notices, and for severance, but also for injury which they would sustain by reason of the construction of the new line on the broad gauge; that the Tondu Works were laid out with lines of communication to the existing ways; and that such communication would become useless or depreciated in value by the construction of the new line: and they also contended, that, under the act of 1855, the existing tramways must be abandoned, to their prejudice, and that they were entitled to compensation upon that assumption.

On the other hand, the company contended that the tramways being in existence at the time of the arbitration, and it being optional with the company whether they would ever abandon them, the umpire had no
*231] *jurisdiction to award compensation upon the assumption that the tramways would then, or at any other time, be abandoned; and that the right to compensation would only arise when, if ever, the abandonment took place.

The umpire received evidence on the part of the Messrs. Brogden of the damage which they would sustain by reason of the tramways being abandoned: and, by his award, made the 28th of February, 1860,—after reciting the notices given by the company, and their willingness to treat with the Messrs. Brogden "for their estate and interest in the said lands and hereditaments, and as to the compensation to be made to them for the damage that they might sustain by reason of the execution of the works authorized by the act;" that the parties could not agree upon the amount of purchase-money and compensation to be paid for their interest in the said lands and hereditaments, whereupon a question of disputed compensation arose; that two arbitrators were appointed, to whom was referred the settlement of the dispute touching the purchase-money and compensation to be paid to the Messrs. Brogden for and in respect of their estate and interest in the said lands and hereditaments; and that the arbitrators did not agree, whereupon the matters so referred to them came before him as umpire,—he directed "that there should be paid by the Llynvi Valley Railway Company to the said Messrs. Brogden as and for the purchase and compensation for and in respect of their interest in the said lands and hereditaments, and for damage sustained and which may be sustained by them by reason of the execution of the works of the said railway, or the exercise by the said company of the powers of the said act, the sum of 7300*l.*; and that in the amount so awarded were included the sum of 150*l.* for the purchase of so much of
*232] the lands *aforesaid as were held on lease under the Countess of Dunraven, and the sum of 200*l.* for so much of the land aforesaid as was held on lease under Mr. Nicholl."

Lush, Q. C., and *Kemplay*, in Trinity Term, showed cause, upon affidavits denying that there had been any excess of jurisdiction on the part of the umpire, and alleging, that, on reference to the plan on which the umpire was to act, a considerable part of the old tramway from Bridgend to Porth Cawl would, in the execution of the proposed works, be absorbed into the new line of railway; that this would be the case on part of the lands of the Messrs. Brogden to be taken by the company; that the change of level and of gauge, and of traction from horse-power to steam, would prevent the Messrs. Brogden from being able to use the

railway as they had used the tramway, without great expense, and would make their private tramway, forming a junction with the public tramway, useless; and that the damage by severance would be considerable, as the furnaces would be severed in part from the cinder-heaps and in part from the coal-mine on the works.

It does not appear that there is any excess of jurisdiction on the part of the arbitrator; and the award, which is in the very terms of the statute, is good upon the face of it. The 18th section of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, provides for notice of the company's intention to take lands; and the service of the notice is regulated by ss. 19 and 20. The 21st section enacts, that, "if for twenty-one days after the service of such notice, any such party shall fail to state the particulars of his claim in respect of any such land, or to treat with the promoters of the undertaking in respect thereof, or if such party and the promoters of the undertaking shall not agree as to the amount of the compensation to be paid by the *promoters of the undertaking for the interest in such lands belonging to such party, or which [*233 he is by this or the special act enabled to sell, or for any damage that may be sustained by him by reason of the execution of the works, the amount of such compensation shall be settled in the manner hereinafter provided for settling cases of disputed compensation." Then follow provisions for the settlement of the claim before two justices where the amount of compensation does not exceed 50*l.* (s. 22), or by arbitration or a jury where it exceeds that sum (s. 23); and then come provisions (ss. 25—36) for the appointment of arbitrators and an umpire. The 37th section enacts that "no award made with respect to any question referred to arbitration under the provisions of this or the special act shall be set aside for irregularity or error in matter of form." And the 63d section provides, that, "in estimating the purchase-money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also for the damages, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special act, or any act incorporated therewith." This court is not a court of appeal from an award under this act; nor has it power to send the matter back to the arbitrator or umpire, the 5th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, not applying to these arbitrations. There can be but one assessment; and it is fair to assume that the company mean to do all that the special act enables them to do. The 53d section of *that act [*234 enacts "that the company may stop up and discontinue the use of and may cease to carry upon their existing railway between Tywith Bridge and Foce Toll House, and may remove the rails and materials thereof, and dispose of the same as they shall think fit; and the company may abandon the construction of the several diversions or deviations of their railway in the parishes of Newcastle and Laleston, and the branch in the parish of Newton Nottage respectively authorized by the Llynvi Valley Railway Act, 1853." [WILLES, J.—The 54th section is important: it provides "that, so long as Walter Coffin, Esq., or

the owner or tenant for the time being of his estate in the hamlet of Bayden and parish of Llangonoyd, or Messrs. John Brogden & Sons, or their partners or assigns, lessees of the Glamorgan Iron and Coal Company's estates below the said estate of the said Walter Coffin, shall be sinking for or work any minerals, and shall desire the accommodation of the present railway or tramway from the point where it passes through the said estates respectively to or near a place called Foce, the same portion or portions as the case may be of the existing railway or tramway shall not be abandoned, but be maintained by the company in an efficient state, and the said several parties aforesaid and each of them shall be entitled to use the same upon such and the same terms, and subject to the same tolls, powers, and renders as are prescribed by the said first recited act, and as if this act had not passed: Provided also that the company may, as to any part of their present railway or tramroad which shall continue in use, demand the same tolls as if this act had not passed."] The umpire was bound to take this matter into his consideration; and the court cannot inquire whether he has made a mistake either in fact or in law. [ERLE, C. J.—What, then, can we *235] take cognisance *of?] Misconduct or corruption in the arbitrator. [ERLE, C. J., referred to the case of Lawrence *v.* The Great Northern Railway Company, 16 Q. B. 643 (E. C. L. R. vol. 71). There, a railway constructed in conformity with its act of parliament was carried along an embankment upon low lands lying between a river and the plaintiff's land. The low lands were separated from the plaintiff's land by a bank, which, before the railway embankment was placed there, sufficed to protect his land from the floodwaters of the river; but, in consequence of the railway embankment, the floodwaters were unable to spread themselves over the low lands as formerly, and flowed over the bank into his land. Before the railway was constructed, and before the plaintiff became possessed of the land so overflowed by the floodwaters, the owner of this and of adjoining land, from whom the plaintiff derived title, agreed with the railway company to refer to arbitration the sum to be paid by the company for the purchase of part of such adjoining land and as compensation for all injury and damage to his remaining estate "by severance or otherwise." It was held that the compensation awarded under this agreement related only to all damage known or contingent by reason of the construction of the railway on the land purchased, and to such other damage arising from the construction of the railway at other places as was apparent and capable of being ascertained and estimated at the time when the compensation was awarded; that it did not embrace contingent and possible damages which might arise afterwards by the works of the company at other places, and which could not be foreseen by the arbitrator; and that compensation for the damage arising to the plaintiff under the present circumstances was not included in the compensation awarded. WILLES, J., referred to Lee *v.* Milner, 2 M. & W. 824,† and to The Imperial Gas-*236] Light *Company *v.* Broadbent, 26 Law J. Ch. 276, 29 Law J. Ch. 377.] The court will not deal with this award otherwise than they would with an ordinary award; and, in the ordinary case of an award which is good upon the face of it, the court will not entertain a motion to set it aside on a suggestion that the arbitrator has made a mistake whether of fact or of law: Russell on Arbitration, 2d edit. 302,

805, 649; Fuller *v.* Fenwick, 3 C. B. 705; Hodgkinson *v.* Fernie, 3 C. B. N. S. 189 (E. C. L. R. vol. 91). Under this act, the arbitrator is bound to award compensation for any injury which must result from the carrying out the works of the company: for instance, compensation for severance damage is given at the time, though the severance is to take place at a future time. Here, the claimants must necessarily sustain damage from the removal of part of the tramroad, which was a portion of the scheme of the company, and the removal of which they were bound to effect.

Bovill, Q. C., and *Karslake*, in support of the rule.—The damages for which compensation is to be given under the provisions of The Lands Clauses Consolidation Act, are, such damages as are capable of being estimated at the time; the arbitrators have no right to take into their consideration speculative or possible future damages. The award here, therefore, which gives the claimants compensation for "damage which they might sustain by reason of the execution of the works authorized by the act," is clearly bad for excess. In The New River Company, app., Johnson, resp., 29 Law J., M. C. 93, by the 12th section of the 10 & 11 Vict. c. 17 (The Waterworks Clauses Act, 1847), powers for the execution of certain works are given; and it is provided that the undertakers shall make full compensation to all parties interested for all damages *sustained by them through the exercise of such powers. In the execution of certain works authorized by a local [*237 act incorporating that section, the appellants intercepted water which would otherwise have percolated through the strata of earth into a well upon the premises of the respondent, and drained off water which had accumulated in the well. Upon a complaint by the respondent before justices to recover compensation for the damage she had sustained, the appellants were ordered to pay her a certain sum, and costs. Upon appeal, the Court of Queen's Bench held that this order was wrong; for, that, inasmuch as no action would lie against the appellants in respect of either quantity of water, supposing no act authorizing the execution of the works had been passed, the claim for compensation could not be sustained. Assuming the award to be good upon the face of it, the general rule, no doubt, is, that the court will not interfere for a mistake of the arbitrator or umpire, whether it be one of fact or of law. But the reasoning applicable to ordinary references, where the parties select their own tribunal, and have the means of agreeing beforehand as to what shall be the subject-matter of inquiry before the tribunal, so selected, is altogether inapplicable to references under The Lands Clauses Consolidation Act. The 37th section shows that the jurisdiction of the courts was not intended to be ousted as to matters of substance. In the case of In re Penny, 7 Ellis & B. 660 (E. C. L. R. vol. 90), it was held, that, where a jury summoned under the 8 & 9 Vict. c. 18, s. 68, have taken into consideration, in awarding compensation, one claim, among others, as to which they had no jurisdiction, a certiorari lies, although such excess of jurisdiction does not appear on the face of the proceedings: such excess of jurisdiction may be shown upon affidavit. To the same effect are the cases of Jubb and The Hull Dock *Company, [*238 9 Q. B. 443 (E. C. L. R. vol. 58), The Queen *v.* The London and North Western Railway Company, 3 Ellis & B. 443 (E. C. L. R. vol. 77),

and The Queen *v.* The South Wales Railway Company, 13 Q. B. 988 (E. C. L. R. vol. 66). *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court:(*a*)—

Upon this rule, the question is whether the umpire has exceeded his jurisdiction by awarding compensation in respect of a claim for damage not within the reference.

From the affidavits in support of the application, it appeared that, before and in the year 1855, the claimants of compensation as occupiers of the Tondu Works had the use of two public tramways for horse-power, with a narrow gauge,—one from Tywith to Porth Cawl, and the other from Bridgend to Porth Cawl; that, in 1855, an act passed empowering a new company to construct a railway for steam-power, with a broad gauge, nearly in the course of the two tramways above mentioned, and granting to it the option of abandoning those tramways, subject to an exception as to part of one of them in favour of the claimants. Under this act the company gave the proper notices for taking parcels of land belonging to the claimants; and, as the parties did not agree, an umpire was appointed according to the provisions of The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), who awarded that the company should pay to the claimants 7300*l.* "as and for the purchase-money and compensation for and in respect of their interest in the said lands, and for the damage sustained and which may be sustained by them by reason
*239] of the execution of the works of the *said railway or the exercise by the said company of the powers of the said act;" and he declared that he gave 150*l.* for the purchase of one part of the lands, and 200*l.* for the purchase of the other part.

The reference was in the usual form, to ascertain the amount of compensation to be paid for the interest in the lands, and for any damage that might be sustained by reason of the execution of the works.

The affidavits showed that the claimants by their counsel and witnesses claimed to be compensated for a supposed loss which would be sustained if each of the two tramways above mentioned was abandoned according to the option given by the act: and the award indicated the same result, as it gave compensation for the land, and for damage from the execution of the works "or the exercise of the powers of the act."

On these grounds, the company contended that the umpire had exceeded the authority given to him by the reference, by giving compensation for a damage which was contingent, and might never arise, and which was not so connected with the land to be taken and the works to be executed thereon as to be within the reference.

In answer to this, the claimants denied that any excess of authority appeared. They showed, by referring to the plan on which the umpire was to act, that, in the execution of the proposed works, a considerable part of the old tramway from Bridgend to Porth Cawl would be in effect absorbed into the new railway; that this would be the case on part of the lands of the claimants to be taken by the company; and that the change of level and of gauge and of traction from horse to steam would prevent the claimants from being able to use the railway as they had used the tramway, without great expense, and would make their private tramway forming a junction with the public tramway useless.

(*a*) The judges present at the argument were Erle, C. J., Williams, J., Willes, J., and Byles, J.

*The affidavits also showed that the damage by severance would be considerable, as the furnaces would be severed in part from the cinder-heaps and in part from the coal-mine on the works. [*240

Upon these facts, we have come to the conclusion that no excess of authority is proved, and therefore the objection to the award is not supported. The affidavits show that the umpire had a right to infer that the execution of the proposed works on the lands of the claimants would render the use of one of the tramways impracticable, if not impossible. If he did so infer, it was his duty to give compensation in respect of the loss of this part of the tramway: and, if any other part of the tramway should be continued by the company, still there was ground to infer that the value of it to the claimants would have been so depreciated by the works as to entitle them to substantial compensation in respect of that part also.

Our judgment proceeds on this view of the effect of the affidavits: but we ought to add, that, in so limiting it, we do not intend to sanction the argument that the award would have been bad, if the umpire *had* given the compensation for contingent damage which the company alleged.

Rule discharged, with costs.

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*SWINDELL and Another *v.* The Company of Proprietors of THE BIRMINGHAM CANAL NAVIGATIONS. [*241

By a canal act it was enacted that no owner or proprietor of any mines or minerals, &c., should open or carry on any work for digging, getting, or discovering such mines or minerals under any tunnel, or within twenty yards of the same, without the consent of the company; and by a subsequent section it was provided, that, when the owner or proprietor of any coal-mine, limestone, or other minerals lying under the said canal, towing-paths, and other works, or within the distance thereinbefore limited, should be desirous of working the same, such owner or proprietor should give three months' notice in writing of such his intention to the clerk of the company, and that, if the company should refuse to permit the minerals to be worked, they should pay to the owner or proprietor such compensation as (in the event of the parties disagreeing as to the amount) should be assessed by a jury.

The plaintiffs,—who were lessees of a mine adjoining the canal, under a lease wherein they covenanted with the lessors that they would without intermission or delay work the mines thereby demised, and raise and get coal and ironstone thereout, until the whole of the said mines, or as great a quantity thereof as by working the said mines in a diligent and effectual manner could or might be gotten, should be worked out, *except the ribs or pillars which must necessarily or which the lessors might require to be left*,—having given the company notice of their intention to work their mine within the prescribed distance of a tunnel, a jury was impannelled to assess the compensation to be paid to them by the company on their refusal to permit them to do so.

In an action to recover the sum so assessed, the company pleaded the covenant above referred to, and alleged that the minerals which the plaintiffs so ceased and abstained from working, and the said coal and ironstone which they so left ungotten, were a rib within the meaning of the covenant, and that, before the time when the plaintiffs first ceased and abstained as in the declaration mentioned, the lessors required the said minerals, &c., above mentioned, to be left by the plaintiffs under the covenant as and for such rib as aforesaid, and of such their requirement duly gave notice to the plaintiffs:—Held, no answer to the action,—the plea disclosing no *covenant*, but merely a partial exoneration from the obligation fully to work the mine,—or, assuming it to be a covenant, it not being one for which a special performance could be enforced in equity, or substantial damages awarded in an action at law.

The defendants further pleaded,—that the plaintiffs did not cease and abstain from working the said minerals within twenty yards of the tunnel aforesaid as alleged,—and that, after the service of the notice in the declaration first mentioned, and after the defendants' refusal to

permit the plaintiffs to work the minerals mentioned in the notice, and after they caused the plaintiffs to be served with a notice in the declaration secondly mentioned, the plaintiffs waived and abandoned the first-mentioned notice, and claimed to work and did work and carry away the minerals in the said notice mentioned:—

Held, that neither of these pleas afforded any answer to the action.

THE declaration stated, that, by an act passed in the session of parliament holden in the 16th year of the reign of His Majesty King George the Third (c. lxvi.), intituled "An act for making and maintaining a navigable canal within and from certain lands belonging to Thomas Talbot Foley, Esq., in the parish of Dudley, in the county of Worcester, to join and communicate with the Stourbridge Navigation, at a place called Black Delph, upon Pensnet Chase, in the parish of Kingswinford, in the county of Stafford" (and hereinafter *called "The Dudley Canal Act"), certain persons therein named, their several and *242]
respective successors, executors, administrators, and assigns, were incorporated by the name of "The Company of Proprietors of the Dudley Canal Navigations;" and several powers and authorities were given and granted to them for making, completing, and maintaining the said canal, and carrying the purposes of the said act into execution, and in particular those thereinafter mentioned and specified: and it was by the said act recited (s. 12) that differences might arise between the said company of proprietors and the several owners of and persons interested in lands, grounds, tenements, hereditaments, or waters which should or might be affected or prejudiced by the execution of any of the powers thereby granted, touching the purchase-money to be paid or recompense to be made to them respectively; and thereby it was therefore enacted that certain persons therein named should be and they and their successors were thereby appointed commissioners for the settling, determining, and adjusting all questions, matters, and differences which should or might arise between the said company of proprietors, their successors and assigns, or any of them, and the several proprietors of and persons interested in any lands, grounds, tenements, hereditaments, or waters, that should or might be affected or prejudiced by the execution of any of the powers thereby granted; and they the said commissioners, or any five or more of them, were thereby empowered, by examination of witnesses upon oath, and by other lawful ways and means in manner in the said act mentioned, to determine and adjust from time to time what distinct sum or sums of money should be paid by the said company of proprietors, their successors and assigns, or any of them, either by an annual rent or payment or by a sum of money in gross, to and *at *243]
the election of such bodies politic, corporate, or collegiate, person or persons, respectively, who should be so entitled or interested as aforesaid, for the absolute purchase of the lands or grounds which should be set out and ascertained as in the act mentioned, for making the said canal or any part thereof, and other the purposes in that act mentioned; and also to determine and adjust what other distinct sum or sums of money should be paid by the said company of proprietors, their successors or assigns, as a recompense for any damages which might or should be at any time or times whatsoever sustained by such bodies politic, corporate, or collegiate, or other person or persons, respectively, being owners of or interested in any lands, grounds, tenements, hereditaments, and waters, for or by reason of the making, repairing, or main-

taining the said canal, or of any reservoirs, trenches, passages, gutters, watercourses, roads, ways, or sluices, or supplying the same or any of them with water as aforesaid, or by the flowing, leaking, or oozing of the water over or through the banks of the said canal, reservoirs, trenches, or sluices, or over or through any passages, gutters, or watercourses which should be made pursuant to the powers thereby given for conveying and communicating water to or from the said canal, or by not cleansing the said watercourses, trenches, or passages, or by turning or diverting any streams or brooks into the same, or by reason or means of the execution of any of the powers therein contained, by the said company of proprietors, their successors and assigns, their agents, servants, or workmen, in case such price or value, damages, and recompense, respectively, could not be settled, adjusted, and agreed upon by and between the said company of proprietors, their successors and assigns, and such proprietors of and persons interested in the said lands and grounds as aforesaid; and, *if the said company of proprietors, their successors and assigns, for and on the part and behalf of themselves, or any such body politic, corporate, or collegiate, or other person or persons so interested or entitled as aforesaid, for and on his or their parts, should refuse to submit any such matter to the determination of the said commissioners, or should be dissatisfied with any determination which should be by them made as aforesaid, the said commissioners, or any five or more of them, should and they were thereby empowered and required from time to time to issue a warrant or warrants under their hands and seals, to the sheriff or sheriffs of the said counties of Stafford or Worcester for the time being, respectively, in which the matter or matters should arise, or, in case such sheriff or sheriffs, his or their undersheriff or undersheriffs respectively, or either of them, should happen to be one of the company of proprietors of the said navigation, or should be interested in the matter in question, then to the coroner or coroners of the said county of Stafford or Worcester respectively, for the impannelling a jury to assess such distinct sum or sums of money or annual rent to be paid for the purchase of such lands or grounds, or the recompense to be made for the damages that might or should be sustained as aforesaid; and the said commissioners or any five or more of them were to give judgment for such purchase-moneys, rent, or recompense so to be assessed by such juries, whose verdict, and the judgment thereupon pronounced by the said commissioners, or any five or more of them, should be binding and conclusive to all intents and purposes against the King's Majesty, his heirs and successors, and against all bodies politic, corporate, or collegiate, and all persons whomsoever: And it was by the said act enacted that no owner or proprietor of any mines or minerals, their workmen or servants, or other *person whatsoever, should open or carry on any work for digging, getting, or discovering such mines or minerals under any tunnel which should be made by virtue of that act, or within twenty yards of the same, without the consent of the said company of proprietors, their successors and assigns, and that no owner or proprietor of any mines or minerals, their workmen or servants, or other person whatsoever, should on any account whatever, open, dig, sink, or carry on any work for the getting of coal, lime-stone, iron-stone, or mineral, within the distance of twelve yards from the said intended canal or any reservoir or reservoirs to be made

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by the said company of proprietors, their successors or assigns, as aforesaid; nor should any coals or other minerals be got under any part of the said canal, or the towing-paths thereunto belonging, or under any such reservoir or reservoirs as aforesaid, or within or under any land or ground lying within the distance of twelve yards of either side of the said canal or any such reservoir or reservoirs or other works, on any account whatsoever, except as thereinafter and hereinafter mentioned, without the consent of the said company of proprietors, their successors and assigns, in writing, under their common seal for that purpose first had and obtained: And it was afterwards by the said act provided and enacted, that, when and so often as the owner or proprietor of any coal-mine, lime-stone, or other minerals lying under the said canal, towing-paths, reservoir or reservoirs, and other works, or within the distance thereinbefore limited, should be desirous of working the same, then and in every such case such owner or proprietor should give notice in writing, under his, her, or their hand or hands, of such his, her, or their intention, to the clerk for the time being of the said company of proprietors, at least three calendar months before he, she, or they should begin *246] *to work such mines lying under the said canal, towing-paths, reservoirs, and other works, or within the distance aforesaid, and upon the receipt of such notice it should and might be lawful for the said company of proprietors, their successors and assigns, to inspect or cause such mines to be inspected in order to determine what coal or other minerals might be come at and actually gotten without prejudice or damage to the said canal, towing-paths, reservoirs, and other works; and, if the said company of proprietors, their successors and assigns, should fail or neglect to inspect or cause such mines to be inspected within the space of thirty days after the receipt of such notice, then it should and might be lawful for the owners or proprietors of such mines, and they were thereby respectively authorized, to work and get such part of the said mines as should lie under the said canal, towing-paths, reservoir or reservoirs, and other works, or within the distance aforesaid, and if upon such inspection as aforesaid the said company of proprietors, their successors or assigns, should refuse to permit the owners or proprietors of the said mines to work such part of the said mines as should lie under the said canal, towing-paths, reservoir or reservoirs, and other works, or within the distance aforesaid, or any part thereof, as they might from time to time have come at and actually gotten, or in any other manner obstruct or prevent them from getting the same, that then the said company of proprietors, their successors and assigns, should within three calendar months after such refusal or obstruction as aforesaid pay or cause to be paid to the owners, proprietors, or workers of such mines respectively, such price or prices for the same in proportion to their several interests therein as the next adjoining mines of equal quality should have been really and bonâ fide sold for or be estimated or valued *247] *at; and, if any question or dispute should arise between the said company of proprietors, their successors or assigns, and the owners, proprietors, or workers of the said mines, their executors or administrators, touching any of the matters aforesaid, then the same should be settled and ascertained by the said commissioners, or any five or more of them, in such manner, and subject to the verdict of a jury, if required, as the value of the lands for making the said canal, towing-

paths, reservoir or reservoirs, and other works, was by the act directed to be settled and ascertained: And it was by that act further provided and enacted that nothing therein contained should extend, or be construed to extend, to defeat, prejudice, or affect the right of any lord or lords of any manor or manors, common or waste grounds, or of any owner or owners of any lands or grounds in, upon, or through which the said canal or towing-paths, wharves, quays, reservoirs, trenches, sluices, passages, watercourses, or conveniences aforesaid, or any of them, should be made, to the mines, minerals, or quarries lying or being within or under the lands or grounds to be set out or made use of for such canal, towing-paths, wharves, quays, reservoirs, or other conveniences aforesaid, or any of them; but all such mines, minerals, and quarries were thereby reserved to such lord or lords of such manor or manors, or of such common or waste grounds, and to such owner or owners of such lands or grounds, respectively, their heirs or assigns; and that it should and might be lawful to and for the lord or lords of such manor or manors, common or waste grounds, or such owner or owners of such lands or grounds, respectively (subject to the conditions and restrictions therein contained), to work all such mines and quarries, and to take and carry away all such coals, ironstone, and minerals as should be gotten therein, to his and their own use; *providing, that, in working such mines and quarries, no injury were done to the said navigation; anything therein contained to the contrary notwithstanding: And the said act also contained divers provisions for the continuance and succession of a sufficient number of commissioners for putting the same in execution: And it was further enacted, that, upon application to be made by the said proprietors, their successors and assigns, or any five or more of them, or by the owners or occupiers of any grounds, lands, tenements, or hereditaments to be affected by the said intended canal, or any of the works necessary or relating thereto, unto the commissioners appointed by and for the purposes of the said act, or any five or more of them, requesting or desiring them to appoint a general meeting of the said commissioners, the commissioners so requested or applied to, or any five or more of them, might and should, and they were thereby respectively authorized and required, within fourteen days after such request or application made, to give notice in manner aforesaid (s. 30) of a general meeting to be held at such time and place as should be specified in such notice, such time not being less than fourteen days nor more than twenty-one days from the day on which such request should be made to them as aforesaid: And it was by the said act provided and further enacted, that it should and might be lawful for any five or more of the said commissioners, and they were thereby empowered, although they should not be assembled at a meeting to be held by virtue of the said act, from time to time, and at all times, upon such request made as aforesaid, by notice in writing signed by them and published in manner required by the said act, to summon a meeting of the said commissioners at such time or place as should be mentioned in such notice, for the settling and ascertaining such damages as were therein *directed to be settled and ascertained, notwithstanding any adjournment or non-adjournment of the said commissioners: And it was further enacted that every meeting of the commissioners for hearing or determining any complaint, controversy, dispute, or difference between the said proprietors,

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their successors and assigns, and any other person or persons, should be held at some place within two miles of some part of the said canal; and that no order or determination should be made unless a majority of the commissioners present at such meeting should concur therein, such majority not being less than the respective numbers thereby authorized to make such orders or determinations: That, by an act passed in the session of parliament holden in the twenty-fifth year of the reign of King George the Third, intituled "An act for extending the Dudley Canal to the Birmingham Canal, at or near Tipton Green, in the county of Stafford," certain persons therein named, and their several and respective executors, administrators, and assigns were united and incorporated with and became part of the said company of proprietors of the Dudley Canal Navigation; and the said company of proprietors were thereby authorized and empowered to make, complete, and maintain a canal navigable for boats, barges, and other vessels, from the said Dudley Canal, in, through, and under (among other lands) certain lands then of John Lord Viscount Dudley and Ward, situate in the parish of Dudley, in the county of Worcester, into a cut or canal in the last-mentioned act mentioned; and that satisfaction and compensation should be made by the said company of proprietors to the said John Lord Viscount Dudley and Ward, his heirs or assigns, for the same out of the moneys to be raised by virtue of that act, such satisfaction and compensation to be
*250] settled and ascertained (in case the parties should not agree about *the same) in like manner as the satisfaction for any damage done by virtue of the act first aforesaid was thereby directed to be ascertained and settled: And the said company of proprietors of the Dudley Canal Navigation were thereby also authorized and empowered to make, erect, execute, do, and perform all such works, matters, and things as should be requisite and convenient for making, completing, and maintaining the said last-mentioned canal, and the navigation thereof, and for supplying the same with water, in as full, ample, and beneficial a manner, to all intents and purposes, as the said company of proprietors were authorized and empowered to do, execute, and perform under and by virtue of the said recited act of the 16 G. 3, c. lxvi., with respect to the canal thereby authorized to be made; and it was thereby enacted that the said act first hereinbefore mentioned, and the several powers, authorities, clauses, provisoes, limitations, exceptions, exemptions, privileges, penalties, forfeitures, punishments, matters, and things therein contained for making, completing, preserving, and maintaining the canal and other works thereby authorized to be done, so far as the nature and circumstances of the case would admit, should be used and exercised by the said company of proprietors, and should be applied and enforced for making, completing, preserving, and maintaining the said canal by the said secondly-mentioned act authorized to be made, and also for making, erecting, executing, doing, and performing all such other works, matters, and things as the said company of proprietors should think necessary or expedient for the benefit of the said undertaking; and that the same persons who were appointed commissioners for putting the said recited act first hereinbefore mentioned in execution should be commissioners for the purposes of that act, that is to say, the act
*251] *secondly hereinbefore mentioned, as fully and effectually to all intents and purposes as if the several powers, authorities, clauses,

provisoes, limitations, exceptions, exemptions, privileges, penalties, forfeitures, punishments, appointment of commissioners, matters and things contained in the said first-mentioned act were repeated and re-enacted in the body of the said secondly-mentioned act, and as if the canal and other works by the said secondly-mentioned act intended to be made, completed, and maintained, had been part of the canal and other works by the said first-mentioned act intended to be made, completed, and maintained: That the said canal so authorized by the secondly above-mentioned act was afterwards made in pursuance of such act, and the same canal was made and passed in, through, and under the said lands of the said John Lord Viscount Dudley and Ward in a tunnel for a long distance, to wit, the distance of 577 yards, and such canal was made and completed long before the plaintiffs had acquired any interest in the mines under the aforesaid land of the said John Lord Viscount Dudley and Ward, and before the passing of the act next hereinafter mentioned: That, by an act passed in the fifth year of the reign of King William the Fourth (c. xxxiv.), intituled "An act to consolidate and extend the powers and provisions of the several acts relating to the Birmingham Canal Navigations," it was enacted that the several persons and bodies politic therein named, their successors, executors, administrators, and assigns, should be united into and become one body corporate by the name of "The Company of Proprietors of the Birmingham Canal Navigations," and by that name should have perpetual succession and a common seal, and by that name should and might sue and be sued: That, by the Birmingham and Dudley Canal *Consolidation Act, 1846 (9 & 10 Vict. c. cclxix.), the said acts firstly and secondly [*252 hereinbefore mentioned were repealed, and the said company of proprietors of the Dudley Canal Navigation were dissolved, and were as hereinafter mentioned incorporated and united with, and became part of, the said company of proprietors of the Birmingham Canal Navigations; but that by the said Birmingham and Dudley Canals Consolidation Act, 1846, it was provided and enacted that nothing in that act contained should affect or prejudice in any respect any rights, liberties, powers, easements, reservations, accommodations, guarantees, exemptions, or protections, which under or by virtue of (amongst others) the hereinbefore and thereinbefore recited acts of the 16th and 25th years of the reign of King George the Third, or any or either of them, were granted, continued, or reserved to or for the benefit of any persons or corporations whose respective estates, canals, mines, works, properties, or interests, were, had been, or might be in anywise affected in or by the making or maintaining or otherwise on account of the canals or works by the same acts respectively authorized, or by reason of the exercise of the respective powers by the same acts granted, or which any persons or corporations other than the Dudley Canal Company were or might be, or, but for the repeal therein contained of the same acts, or such portions thereof as aforesaid, would or might have been, entitled unto or competent to enforce; and that such several persons and corporations should be entitled to, and should have, use, and enjoy the same rights, liberties, powers, easements, reservations, accommodations, guarantees, exemptions, and protections, or so many of them as they would respectively have been entitled to if the said acts or such portions thereof as aforesaid had not been thereby repealed, and should have the like powers and remedies

*253] *upon and against the said company of proprietors of the Birmingham Canal Navigations (which company are the defendants in this suit) and any other persons for securing the possession, use, and enjoyment of such rights, liberties, powers, easements, reservations, accommodations, guarantees, exemptions, and protections under the said repealed acts, or any of them, as they would have had upon and against the Dudley Canal Company or such other person if the act now recited had not been passed; and, in every case in which under the repealed acts or otherwise any such right, liberty, power, easement, reservation, accommodation, guarantee, exemption, or protection was to be exercised, enjoyed, or enforced, with the consent, or under the superintendence, or subject to the control in any particular of the Dudley Canal Company, or the committee of management, officers, or agents thereof, the same should be exercised, enjoyed, or enforced in like manner and in the same particular, with the consent, or under the superintendence, or subject to the control of the defendants or their committee of management, officers, or agents, respectively: That, by the same act it was enacted, that, from and immediately after the passing thereof, the several persons and corporations who immediately before the passing thereof were proprietors of any shares or portions of shares in the capital of the Dudley Canal Company should be and were thereby incorporated with the said company of proprietors of the Birmingham Canal Navigations; and that, from and immediately after the passing of the act, all the canals and cuts made or executed by or for the use of, or which immediately before the passing of the act were vested in the Dudley Canal Company, and all other lands, buildings, works, easements, privileges, tenements, and

*254] hereditaments whatsoever, and of *whatever tenure, of or to which the Dudley Canal Company immediately before the passing of the act and by virtue of the recited acts, any or either of them, or by any other means whatsoever, were seised, possessed, or entitled, at law or in equity, or which they could have used, exercised, or enjoyed in any manner, if the act had not been passed, or over which they had any right of disposition, should belong to and were thereby vested in the defendants for the same respective estates, interests, rights, and powers, and should thenceforth and to the extent of the same estates, interests, rights, and powers, form part of the Birmingham Canal Navigations and of the capital of that company: That, by a certain indenture of lease bearing date the 1st of April, 1837, and made between The Right Rev. Henry Lord Bishop of Exeter, The Right Hon. Edward John Baron Hatherton, Francis Downing, and John Benbow, Esqs., of the one part, and Samuel Evers and Robert Martin, coal and iron-masters and copartners (both since deceased), of the other part, the said parties thereto of the first part, as trustees under and in execution of the powers for that purpose contained in the will of the Right Hon. John William Earl of Dudley, deceased, granted, demised, and leased unto the said Samuel Evers and Robert Martin, their executors, administrators, and assigns, certain furnaces therein described, called The Parkhead Furnaces, therein mentioned to be situate in the parish of Dudley, in the county of Worcester, and certain messuages, lands, and premises therein described, and also all and singular the mines, beds, measures, and strata of coal called the Thick or Ten Yard Coal, The Heathen Coal, and the Brooch Coal, and of ironstone called The Gubbin Ironstone, and The White

Ironstone lying below the Thick Coal, and the Penny Earth Ironstone, and all other ironstone lying or which might be found above the Thick Coal, in and under all those said *lands thereinbefore described and demised, annexed, and next and appurtenant to the furnaces [*255 therein mentioned, or so much and such part thereof as should not be within thirty yards of any of the buildings therein mentioned, which parts were to be left for the preservation of such furnaces and buildings; and also in and under certain messuages or dwelling-houses, yards, gardens, roads, closes, pieces or parcels of land, and premises therein described, which said several premises contained together, by admeasurement, including the site of the buildings, 80*a.* 0*r.* 8*p.*, or thereabouts, and belonged to the said lessors as such trustees as aforesaid; together with full and free liberty, power, and authority to and for the said lessees, their executors, administrators, and assigns, and their miners, agents, workmen, and servants, to enter into and upon certain parts of the lands and hereditaments thereinbefore secondly described as were not then in their own occupation, to occupy so much and such part and parts thereof as might be necessary or convenient for the carrying on of the working of the said mines, they the said lessees, their executors, administrators, and assigns, first giving such notice and paying compensation as in the said indenture was expressed; and also with like full and free liberty and authority to and for the said lessees, their executors, administrators, and assigns, to make, construct, and set up such engines, gins, and other machinery and erections upon the said lands, or any part thereof, and to open, sink, drive, work, and make such pits, shafts, adits, canals, watercourses, fences, soughs, tunnels, drains, ways, paths, passages, roads, and railways in and upon or under the same lands, or in, under, or upon any part or parts thereof, as should be requisite for the purpose of working the said mines of coal and ironstone, and getting, stacking, consuming, converting, carrying *away, and disposing of the produce thereof, or for the purpose of burning coke from [*256 the coal gotten out of the said mines, or of calcining the ironstone raised and gotten therefrom, and also for the carrying away and disposing of the same coal and ironstone, and the coke made therefrom, and to work, get, raise up, stack, carry away, sell, consume, convert, and dispose of for their own use and benefit, the produce of the said mines of coal and ironstone and every part thereof, and generally to do and perform all such acts, matters, and things as might be requisite or necessary to be done and performed in, upon, or under the said lands and premises thereinbefore secondly described, and as are usually permitted to lessees in leases of the same or the like nature as the now stating demise, for the purpose of getting, converting, selling, consuming, disposing of, and carrying away the produce of the said mines of coal and ironstone to the greatest advantage, except and reserved as in said indenture mentioned and expressed,—To hold the same unto the said lessees, their executors, administrators, and assigns, from the date of the now stating indenture for the term of twenty-one years, at the rents and royalties thereby reserved, and at a minimum rent of 2000*l.*, and subject to the covenants and stipulations therein contained: That the mines which the plaintiffs abstained as hereinafter mentioned from getting, are part of the mines demised by the last-mentioned indenture: That, by an indenture dated the 21st of June, 1841, and made between the said Samuel Evers of the

first part, the said Robert Martin of the second part, Henry Lord Bishop of Exeter, Edward John Baron Hatherton, and John Benbow, of the third part, the plaintiff James Evers Swindell, then and therein called by his then name of James Evers, and the plaintiff Charles Evers Swindell, then and therein called by his then name of Charles Evers, of the fourth part, the *said Samuel Evers, with the license and consent of the parties thereto of the third part, assigned his share and interest in the said Parkhead Furnaces and the said mines, premises, and powers demised by the said lease, unto the plaintiffs for the residue of the said term of twenty-one years thereby granted, subject to the rents, royalties, and obligations, thereby reserved and imposed: That, by an indenture dated the 31st of December, 1847, and made between Joseph Webb, Robert Martin, and John Harper, executors of the will of the said Robert Martin (party to the hereinbefore stated indenture of the 1st of April, 1837), then deceased, of the first part, The Right Hon. William Lord Ward of the second part, the plaintiffs (by their respective then names of James Evers and Charles Evers) of the third part, and Samuel Evers of the fourth part, the share and interest of the said Robert Martin, deceased, under the said lease in the same thereby demised furnaces, mines, powers, and premises, was assigned with the like consent and concurrence of the said lessors unto the said plaintiffs: That, afterwards, and by virtue of the aforesaid indentures of lease, and the said indentures of assignment, the plaintiffs, as partners, proceeded to work the demised minerals under the said land, the same being land in and under part of which the said tunnel was made, and became the workers of such demised minerals, and that, afterwards, the plaintiffs were desirous of working the coal and ironstone hereinafter mentioned lying under the said tunnel, and being part of such demised minerals; and thereupon they caused to be served on the clerk for the time being of the defendants a notice in writing under their hands, that it was their intention at the expiration of three months from the date thereof, to work under and within the distance of twelve yards of each side of that portion of *the said canal, tunnel, and works called the Dudley Tunnel which lay between certain points marked A. and B. in a plan annexed to the said notice, the same being situate, lying, and being within the parish of Dudley, in the county of Worcester, the following minerals, that is to say, all and singular the mines, beds, measures, and strata of coal called The Thick or Ten Yard Coal, and the Heathen Coal, and of ironstone called the Gubbin Ironstone and the White Ironstone, lying below the Thick Coal, and the Penny Earth Ironstone, and all other ironstone lying, or which might be found, above the Thick Coal, the said minerals being part of the minerals demised and assigned as aforesaid: That the defendants afterwards refused to permit the plaintiffs to work the mines mentioned in the said notice, or any part thereof, and caused the plaintiffs to be served with a written notice addressed to them, in the words and figures following:—

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"To Messrs. James Evers Swindell and Charles Evers Swindell, of Cradley, in the county of Worcester, coal-masters:

"You having given notice of your intention to work under and within the distance of twelve yards on each side of that portion of the canal, tunnel, and works called The Dudley Tunnel, now belonging to the company of proprietors of The Birmingham Canal Navigations, con-

structed, as alleged, in pursuance of an act passed in the 16 G. 3, c. lxvi., which lies between the points marked A. and B. on the plan annexed to the said notice, situate, lying, and being in the parish of Dudley, in the county of Worcester, the following minerals, namely, all and singular the mines, beds, and strata of coal called The Thick or Ten Yard Coal and the Heathen Coal, and the ironstone called the Gubbin Ironstone and the White Ironstone, lying below the Thick *Coal, [*259 and the Penny Earth Ironstone, and all other ironstone lying or which might be found above the Thick Coal, I, the undersigned Robert Thomas, clerk to the company of proprietors of The Birmingham Canal Navigations, do hereby give you and each of you notice that the said company of proprietors of the Birmingham Canal Navigations have, in conformity with the provisions and requirements of the said act of parliament, and of other the acts of parliament relating thereto, inspected the said mines: And I further give you and each of you notice that the said company of proprietors of The Birmingham Canal Navigations refuse to permit you or either of you, and also refuse to permit the owners or proprietors of the said mines or any or either of the said owners or proprietors, and also refuse to permit any other person, to work such part of the said mines as lie under the said Dudley Tunnel or within twenty yards of the same, or any part thereof, as you or either of you, or the owners or proprietors of the said mines, or any or either of such owners or proprietors, or any other person might have come at and actually gotten: And I further give notice to you and every of you, and to the owners or proprietors of the said mines, and to each of such owners or proprietors, and to all other persons whom it may concern, not to work, and to desist from working, such part of the said mines as aforesaid: And I lastly give you and each of you notice, that, if you attempt to work such part of the said mine as aforesaid, the said company of proprietors of The Birmingham Canal Navigations will take immediate proceedings in the High Court of Chancery to obtain a writ of injunction to restrain you from so doing; and you will be held answerable to the said company of proprietors for all injury, damages, loss, and expenses they may sustain or be put unto by reason of such unlawful act.

*"Given under my hand the 15th day of January, 1857. [*260

"ROBERT THOMAS."

Averment, that the plaintiffs, upon being served with such last-mentioned notice, ceased and abstained from working the said minerals within twenty yards of the aforesaid tunnel, and left there a large quantity of coal and ironstone which but for the defendants' objections thereto they might have gotten, and afterwards gave notice to the defendants that they had done so: That, although the said defendants did as aforesaid refuse to permit the said plaintiffs to work such part of the said mines as lay under the said tunnel, or within the distance aforesaid, as they might have come at and actually gotten, and although three calendar months after such refusal had elapsed, the defendants did not pay or cause to be paid to the plaintiffs, being the workers of the said mines as aforesaid, such price or prices for the same as in the said first-mentioned act of parliament in that behalf specified, but, on the contrary thereof, disputed their liability to pay for the same, and the amount payable by them, and took no steps to ascertain such amount;

and thereupon the plaintiffs did duly inform the commissioners then in existence and duly appointed by virtue of the acts aforesaid of and make their complaint to them in the premises, and did request and desire them or any five or more of them to take such proceedings under and according to the said first-mentioned act that a meeting of the said commissioners might be summoned and take place for the settling and ascertaining by them the said commissioners or any five or more of them of the said question and dispute between the plaintiffs and defendants as to the price or prices to be paid by the defendants to the
*261] plaintiffs for the said mines which they so ceased to *work and desisted from working as aforesaid: That, afterwards, five of the said commissioners for the time being duly qualified and empowered for that purpose, at the request of the plaintiffs, duly appointed the 25th of January, 1859, at Dudley, in the county of Worcester, being a place within two miles of the said canal, for a general meeting for the purpose of proceeding to adjudicate upon the said information and complaint of the plaintiffs, and for settling, determining, ascertaining, and adjusting the said question and dispute between the plaintiffs and defendants as to the price or prices to be paid by the defendants to the said plaintiffs for the said mines which they the plaintiffs so ceased to work and desisted from working as aforesaid, and of which said meeting for the purposes aforesaid due notice was given by advertisement and otherwise as by the said acts required: That, at a general meeting of the said commissioners holden at the time and place last aforesaid in pursuance of the said appointment and notice, the said information and complaint of the said plaintiffs came on to be and the same was duly determined and adjusted by five in number of the said commissioners for the time being duly qualified and appointed, five being the whole number present at that meeting; and the plaintiffs and defendants respectively then and there appeared by their counsel and attorneys; and the last-mentioned five commissioners, at such meeting, by an examination of witnesses on oath, and by other lawful ways and means, inquired into the premises, and thereupon, all five concurring, then duly determined and adjusted that the defendants should pay to the plaintiffs the sum of 10,350*l.* as and for the price of the said mines and minerals so ungotten by them as aforesaid: That the defendants were dissatisfied with the said determination, and afterwards gave notice thereof under their
*262] common seal to the said *commissioners, and also to the said plaintiffs; and thereupon five of the said commissioners duly qualified and authorized in that behalf did by their warrant duly made, executed, and issued under their hands and seals, require the coroners of the county of Worcester, being the county in which the matters in question arose, they being duly qualified, the sheriff and undersheriff thereof being each one of the company of proprietors of the said Birmingham Canal Navigations, to impannel, summon, and return a jury of twenty-four sufficient and indifferent men qualified according to the laws of this realm to be returned for trials of issues joined in Her Majesty's courts at Westminster, to appear before the said commissioners or any five or more of them, at Dudley aforesaid, on Monday the 31st of October, 1859, at 10 o'clock in the forenoon, at the house of Alice Smith, called The Dudley Arms, or the Hotel, to settle and ascertain the said question and dispute as to the price or prices to be paid by the

defendants to the plaintiffs for the said mines which they the said plaintiffs so ceased to work and desisted from working as aforesaid: That afterwards, at the time and place last aforesaid, such place being within two miles of the said canal, before, &c., &c., being five of the said commissioners for the time being duly appointed and qualified as aforesaid, assembled at a meeting of the said commissioners, and a jury duly summoned by the said coroners in pursuance of the said warrant the said 31st of October being not less than nine or more than fourteen days after the service of the said warrant on the said coroners, as required by the first before mentioned act (s. 12), the said jury having been duly sworn, and all things having been done, and all times having elapsed to render the said meeting a lawful meeting for the purpose aforesaid, the plaintiffs and defendants appeared before the said commissioners and *jury by their respective counsel and attorneys, and witnesses for the plaintiffs and also for the defendants were duly summoned [*263 on oath; and the jury then upon their oaths did duly and according to the provisions of the said acts assess, settle, and ascertain the sum of money to be paid by the defendants as the prices to be paid to the plaintiffs for the said mines which they so ceased and desisted from working as aforesaid, at the sum of 8000*l.*; and thereupon the last-mentioned commissioners did pronounce and give judgment for the said sum of money so assessed by the said jury as aforesaid, that is to say, for the said sum of 8000*l.* to be paid to the plaintiffs by the defendants: And that, by reason of the premises, an action had accrued to the plaintiff to demand and recover the said sum of 8000*l.* from the defendants; yet the defendants had not paid the said sum of 8000*l.* nor any part thereof to the plaintiffs, &c.

The defendants pleaded,—first, that the said minerals which the plaintiffs ceased and abstained from working, and the said coal and ironstone so left ungotten by the plaintiffs as in the declaration mentioned, and every part thereof, were situate under or within twenty yards of the said tunnel made by virtue of the said secondly recited act; and that the same could not, nor could any part thereof, have been worked or gotten without opening or carrying on work for digging, getting, or discovering mines or minerals under the said tunnel or within twenty yards of the same; and that the defendants did not then consent and never had or have consented to the plaintiffs or any other person opening or carrying on any such work.

Secondly, that the said minerals which the plaintiffs ceased and abstained from working, and the said coal and ironstone which they left ungotten, could not nor *could any part thereof have been worked, taken, and carried away without serious and irreparable [*264 injury to the said navigation in the said secondly recited act mentioned; and, by reason thereof, it was not lawful to or for the plaintiffs during all or any part of the time that they so ceased and abstained from working, and left the said coal and ironstone ungotten, to have worked, taken, or carried away the said minerals, coal, and ironstone, or any part thereof.

Thirdly, that the said tunnel made by virtue of the said secondly recited act as in the declaration mentioned, was constructed and had continued to exist in the same state and condition for more than sixty years before the said time when the plaintiffs ceased and abstained from working as

in the declaration mentioned; that a part of the said tunnel, and of the said canal passing through the said tunnel, that is to say, for the length of 577 yards, were and are made and constructed in, through, and upon land which was conveyed and assigned to the said company of proprietors of the Dudley Canal Navigation in the declaration mentioned, by the said John Lord Viscount Dudley and Ward, who was the then owner and proprietor thereof, immediately before the making and constructing of the said tunnel and canal, and with the intention and for the purpose that the said part of the said tunnel and canal should be made and constructed in, through, and upon the same in the manner in which the same were afterwards so made and constructed and now continue to exist; that, at the times of such conveyance and assignment, and of the making of the said part of the said tunnel and canal respectively, the said John Lord Viscount Dudley and Ward was also the owner and proprietor of all the lands, mines, and minerals then and still lying under
*265] and within twenty yards of the said part of the said *tunnel, including the said minerals which the plaintiffs so ceased and abstained from working, and the said coal and ironstone so left ungotten by the plaintiffs as alleged: That all the estate and interest of the plaintiffs in the last-mentioned minerals, coal, and ironstone came to and was derived by the plaintiffs from the said John Lord Viscount Dudley and Ward, and from his estate and interest therein at the times of the said conveyance and assignment, and of the making of the said part of the said tunnel and canal as aforesaid, by divers mesne assignments: That, at all times from the making and constructing of the said part of the said tunnel and canal up to the commencement of this suit, the said minerals, coal, and ironstone above mentioned, and every part thereof, had supported and upheld, and were necessary and required for the supporting and upholding of the said part of the said tunnel and canal, and the said part of the said tunnel and canal would without such support and upholding by the said minerals, coal, and ironstone, and every part thereof, have been seriously and irreparably injured, and would have fallen in and been destroyed.

Fourthly, that, in and by the said indenture of lease of the 1st of April, 1837, the said Samuel Evers and Robert Martin, for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenanted, promised, and agreed to and with the said Henry Lord Bishop of Exeter, Edward Baron Hatherton, Francis Downing, and John Benbow, their executors, administrators, and assigns, and to and with the persons or person for the time being entitled under the said will of the said Earl of Dudley in reversion immediately expectant on the said term of twenty-one years thereby granted (among other things), that they the said lessees, their executors, administrators, or assigns, should
*266] and would at their own costs and charges *continue without intermission or delay to work the said mines thereby demised, and raise and get coal and ironstone thereout until the whole of the same mines or as great a quantity thereof as by working the said mines in a diligent and effectual manner could or might be gotten should be worked out, *except the ribs and pillars which must necessarily, or which the said lessors might require to be, left:* That the said minerals which the plaintiffs so ceased and abstained from working, and the said coal and ironstone which they so left ungotten, were a rib within the meaning

of the said covenant: That, before the time when the plaintiffs first ceased and abstained as in the declaration mentioned, William Baron Dudley and Ward, who then was the person for the time being entitled under the said will of the said Earl of Dudley in reversion immediately expectant on the said term of twenty-one years, did require the said minerals, coal, and ironstone above mentioned to be left by the plaintiffs under their said covenant as and for such rib as aforesaid, and of such his requirement duly gave notice to the plaintiffs then being the lessees of the said demised premises; and everything was done and happened necessary for the said requirement and notice being, and the same were, a good and effectual requirement under the said covenant during all the time that the plaintiffs ceased and abstained from working the said minerals and left the said coal and ironstone ungotten, and for entitling the lessor or lessors for the time being to have the said covenant performed and observed by the plaintiffs during all the said time.

Fifthly, that the plaintiffs did not cease and abstain from working the said minerals within twenty yards of the tunnel in the declaration mentioned, as alleged.

Sixthly, that, after the plaintiffs caused to be served the said notice in the declaration first mentioned, and *after they the defendants refused to permit the plaintiffs to work the mines mentioned in [*267 the said notice, or any part thereof, and caused the plaintiffs to be served with the notice in the declaration secondly mentioned, and before the information by the plaintiffs to the commissioners as in the declaration mentioned, they the plaintiffs wholly withdrew, abandoned, waived, and gave up the said first-mentioned notice, and all their rights and powers thereunder, and claimed to work, get, and carry away the said coal and ironstone mentioned in the said notice within twenty yards of the said tunnel, and did in fact work, get, and carry away a portion of the said coal and ironstone within twenty yards of the said tunnel accordingly.

The plaintiffs demurred to each of these pleas, the grounds of demurrer alleged being,—As to the first plea, "because the clause on which it is founded is qualified by subsequent parts of the acts of parliament which give compensation for the minerals if the company do not consent."

As to the second plea, "because, on the true construction of the act, the owners of mines may get them although they may thereby do irreparable injury to the navigation, if the company will not pay for them and put the mine-owner in a situation to enforce such payment, as provided by the act."

As to the third plea, "because it is founded on the assumption that the proprietors of the canal have acquired a right of support by the minerals, such as is usually acquired under the ordinary conveyances, whereas the act of parliament shows that the right was not to be so acquired, but to be purchased, if required, when the mine-owner was about to work the coal."

As to the fourth plea, "because it does not show any want of jurisdiction in the commissioners or the *compensation jury: and [*268 the defendants cannot raise the question of a breach of covenant to which they are no parties, and to the advantage of which they have no right or title."

As to the fifth plea, "because the rights of the company and mine-

owner were fixed by the notice of the company not to work; and, if the mine-owner did work afterwards, he was liable to an action at the suit of the company for doing so, but did not lose his right to compensation for the minerals he left."

As to the sixth plea, "because the plaintiffs could not abandon their notice and their rights under it without the agreement and consent of the defendants, who had acquired an absolute right to have the minerals left; so that any act of working of the plaintiffs consequent on the supposed abandonment was an injury to the defendants, for which their remedy was by action and injunction, but left the plaintiffs the right to call for their compensation for the minerals left by them, when they took the proper view of their case."

Replication to the third plea,—that the land which was conveyed and assigned to the company of proprietors of the Dudley Canal Navigation by the said John Lord Viscount Dudley and Ward, as in the said third plea mentioned, was so conveyed under and subject to the provisions of the act of parliament in the declaration secondly mentioned, and not otherwise.

The defendants demurred to the replication to the third plea, one ground of demurrer being "that there is nothing in the provisions of the act of parliament which would entitle the plaintiffs to be paid for the minerals."

Joinders in demurrer.

*269] *Gray* (with whom was *Bovill*, Q. C.), for the plaintiffs.(a)—The general question of the right to be paid compensation for the value of the minerals within the prescribed distance from the canal, where the owners have been prevented by the company from working them, was decided by Vice-Chancellor Wood, assisted by the late Mr. Justice Crowder: and the plaintiffs' right was affirmed by the judgment of the Court of Queen's Bench upon a special case, that court conceiving the matter to be concluded by the decision in Chancery. One question intended to be raised here is, that which was raised in the Court of Exchequer in Fletcher *v.* The Great Western Railway Company, 4 Hurlst. & N. 242,† and in the Exchequer Chamber in the same case in error, The Great Western Railway Company *v.* Fletcher, 5 Hurlst. & N. 689.† It was there held, that a railway company, which, by agreement with the owner, has purchased his land for the purpose of their railway, and taken a conveyance in the form prescribed by the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and which, after notice pursuant to the 78th section of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), of the owner's intention to work the minerals under the railway, has refused to make him compensation, is not entitled to the adjacent or subjacent support of the minerals, but the owner is entitled to get them, although the working them may cause the surface to subside; and that, where, under such circumstances, the company had given notice that the work-

*270] ing the mines *would destroy the support of the railway, the owner of the minerals was entitled to recover the compensation which

(a) The point marked for argument on the part of the plaintiffs, as to the demurrer to the replication to the third plea, was as follows:—

"That the provisions of the act of parliament entitle the plaintiffs to be paid for the minerals under the circumstances disclosed in the declaration, the third plea, and the replication thereto."

had been assessed under the 78th section. The fourth plea is clearly bad: it relies upon an exception in the lease under which the plaintiffs are entitled to work the mines, and seeks to imply from that a covenant on the part of the plaintiffs as lessees to leave the ribs and pillars. Assuming that this did amount to a covenant, it would be no answer to the action. But it is submitted that there is neither a covenant in terms nor anything from which a covenant can be implied. The lessees are to get all the coal except such ribs and pillars as are necessary to be left or which the lessors might require to be left. That exception was merely to prevent the lessees being charged with a breach of their covenant to work out all the coal, for leaving ribs and pillars which they might judge necessary for the support of the surface land, or as they might be reasonably and properly required by the lessors to leave unworked. Every covenant must be pleaded according to its legal effect: Chester *v.* Willan, 2 Wms. Saund. 96 *b*. In all cases where covenants have been implied, they have been necessarily implied. Here, the whole instrument is not set out, so as to enable the court to make the implication it is asked to make. Then, it is submitted that it is not competent to the defendants to raise the question in this action: it must be taken to have been decided by the commissioners and by the finding of the jury upon whose assessment the commissioners finally gave their judgment: The Earl of Radnor *v.* Reeve, 2 Bos. & P. 391. The 12th section of the 16 G. 3, c. lxvi., expressly provides that "the verdict, and the judgment thereupon pronounced by the said commissioners, or any five or more of them, shall be binding and conclusive to all intents and purposes against the King's Majesty, his heirs and successors, *and against all bodies politic, corporate, or collegiate, and all persons whomsoever." [WILLIAMS, J.—Suppose it was urged before the jury that the lessees had no right to take the ribs or pillars, would not the answer to that be that the jury were only to assess the amount of compensation, not to determine the right?] The title is not in question here: the right to the coal is unquestionably in the plaintiffs. [WILLES, J.—May not the exception be void for unreasonableness? It is, to leave so much as may be necessary, or as the lessors may require to be left.] No doubt it would be the lessors' interest to get as much left as possible. [BYLES, J.—It may be, that, if the lessors are entitled to anything, the lessees would be trustees for them: and that would suffice for the purpose of to-day.] (*a*) The fifth plea states that the plaintiffs did not cease and abstain from working the said minerals within twenty yards of the tunnel aforesaid, as alleged; and the sixth, that, after the plaintiffs caused to be served the said notice in the declaration first mentioned, and after they the defendants refused to permit the plaintiffs to work the mines mentioned in the said notice, or any part thereof, and caused the plaintiffs to be served with a notice in the declaration secondly mentioned, and before the information by the plaintiffs to the commissioners as in the declaration mentioned, they the plaintiffs wholly withdrew, abandoned, waived, and gave up the said first-mentioned notice, and all their rights and powers thereunder, and claimed to work, get, and carry away the said coal and ironstone mentioned in the said notice within twenty yards of the

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(*a*) It was stated that the jury had in fact given compensation only for so much of the coal as the plaintiffs were entitled to take, leaving the necessary ribs and pillars.

*272] *said tunnel, and did in fact work, get, and carry away a portion of the said coal and ironstone within twenty yards of the said tunnel accordingly. Now, the legal effect of the two notices was this,—When the lessees give the company notice of their intention to work within the distance mentioned in the 58th section, it is for the company to say whether or not they will allow it. They determine that option by giving the parties notice not to work. From that moment their respective rights are ascertained and fixed. The notice cannot be waived: it is a statutory contract. If the plaintiffs have done wrong in getting the coal after notice, they may be liable in a cross-action. But it is no answer to this claim.

Horace Lloyd (with whom was *Phipson*), for the defendants.(*a*)—The

(*a*) The points marked for argument on the part of the defendants were as follows:—

"1. That the declaration is bad, and the first plea is good:

"2. That, under the 58th section of the 16 G. 3, c. lxvi., there is an absolute prohibition against the owners of mines getting minerals under and within twenty yards of any tunnel, without the consent of the company:

"3. That the provision in the latter part of the same section, as to getting minerals under and within the distance of twelve yards from the canal, &c., '*except as thereinafter mentioned*,' relates to parts of the canal other than a tunnel, and in no way qualifies such absolute prohibition:"

"4. That the 61st section of the same act relates to the provision in the latter part of the 58th section as mentioned above, and to the getting of minerals under and within the distance of twelve yards of parts of the canal other than a tunnel, and does not qualify the absolute prohibition against getting minerals under or within twenty yards of a tunnel, or entitle the owners of minerals under or within twenty yards of a tunnel to any compensation for leaving them ungotten:

"5. That the second plea is good; and that, although by the 78th section of the same act, the mines and minerals under the land of the company, and the right of working them (subject to the conditions and restrictions contained in the act), are reserved to the owners of such mines, the right to work them is subject to the proviso at the end of that section, that no injury be thereby done to the navigation:

"6. That, under the circumstances stated, and by reason of the provisions of the 78th section, the plaintiffs never were at any time entitled to get the minerals in question, and cannot claim compensation for abstaining from getting them:

"7. That the third plea is good; and that, under the circumstances stated in that plea, the defendants had acquired an easement as against the plaintiffs to have their canal and tunnel supported by the plaintiffs' minerals, and the plaintiffs were bound to leave the minerals for this purpose:

"8. That the plaintiffs, being bound to leave the minerals for the purposes of such support, and having no right or power to get the same, cannot claim compensation under the 61st section of the act for abstaining from getting them:

"9. That the replication to the third plea is bad; and that, notwithstanding the land mentioned might be conveyed under the act of parliament, the defendants were nevertheless entitled to the easement claimed, and the plaintiffs were bound to leave the minerals ungotten:

"10. That the replication is also bad, because there is nothing in the provisions of the act entitling the plaintiffs to such compensation as they claim:

"11. That the fourth plea is good; that the effect of the covenant set out is, to except from the lease such ribs and pillars as are therein referred to, and consequently that the minerals in question (which are admitted to be a rib within the meaning of the deed) were not the property of the plaintiffs, but of the owner of the reversion:

"12. That, whether the effect of the covenant be this or not, the plaintiffs, by reason of this covenant, were not entitled to get the said minerals, and consequently cannot claim compensation for abstaining from getting them:

"13. That the fifth plea is good; and that, to entitle the plaintiffs to compensation under the 61st section, it was necessary that they should comply with the notice given by the company, and should cease and abstain from working the minerals:

"14. That, if the plaintiffs did not cease and abstain from working upon the refusal of the company, but worked from that time and during the whole of the three calendar months after such notice (which is consistent with the declaration and fifth plea), they could not be at the end of the three calendar months entitled to be paid compensation under the 61st section:

questions which arise upon the *fifth and sixth pleas are two,— [*273
first, whether the working of the minerals within twenty yards of the tunnel was an answer to the plaintiffs' claim,—secondly, whether it was not competent to the plaintiffs to abandon their notice and waive all their rights *thereunder, at all events within the three months. [*274
The 59th section of the 16 G. 3, c. lxvi., enacts that "no owner or proprietor of any mines or minerals, their workmen or servants, or other persons whatsoever, shall, on any account whatever, open, dig, sink, or carry on any work for the getting of coal, limestone, ironstone, or mineral, within the distance of twelve yards from the said intended canal, or any reservoir or reservoirs to be made by the said company of proprietors, their successors or assigns, as aforesaid, nor shall any coals or other minerals be got under any part of the said canal, or the towing-paths thereunto belonging, or under any such reservoir or reservoirs as aforesaid, or within or under any land or ground lying within the distance of twelve yards of either side of the said canal, or any such reservoir or reservoirs, or other works, on any account whatsoever, except as *hereinafter mentioned, without the consent of the said company [*275
of proprietors, their successors and assigns, in writing, under their common seal, for that purpose first had and obtained." By s. 62, the owners of any mine lying under the canal, towing-paths, reservoirs, and other works, or within the distance thereinbefore limited, being desirous of working the same, must apply to the company for permission, who, if they refuse to permit such working, must make compensation to the owners,—such compensation to be assessed by a jury, if the parties cannot agree, within three months after such refusal. The plaintiffs here gave notice under that section. The rights of the parties are inchoate until the expiration of the three months. But, if the owner goes on working in the meantime, he surely cannot be entitled to claim compensation. It goes to the very root of the claim for compensation, that the owners have in consequence of the company's refusal to consent to the working been deprived of the coal. The notice to work and to claim compensation for being obstructed in the working remits the parties to their original position. The question which arises upon the fourth plea is rather one of construction than of general principle. It turns upon the meaning to be given to the words "except the ribs and pillars which must necessarily be left or which the lessors may require to be left." The question is whether that is an implied covenant, or obligatory on the lessees to leave the ribs and pillars if required by the lessors. It is said that it is merely in the nature of an exception out of a covenant, which would otherwise be imperative. The lessees are bound to leave what is necessary for the support of the surface, and such other ribs and pillars as the lessors may require. That necessarily implies that the lessors shall have a right to require ribs and pillars to be left. An instance of *an implied covenant is to be found in the case of Wood [*276
v. The Copper Miners Company, 14 C. B. 428 (E. C. L. R. vol. 78). [WILLIAMS, J.—If a covenant to abstain from working out the

"15. That it was competent to the plaintiffs at any time to withdraw, abandon, waive, and give up their notice, and all their rights and powers under it:

"16. That, at any rate, it was competent to the plaintiffs so to do within the period of three calendar months next after such refusal, and before the time arrived at which they could be entitled to be paid any compensation."

minerals in which the lessees may be required by the lessors to leave is necessarily to be implied, your argument is well founded. WILLES, J., referred to Doe d. Rogers *v.* Price, 8 C. B. 894 (E. C. L. R. vol. 65).] This is not an exception out of the demise, but an exception out of a covenant. The verdict of the jury is conclusive as to the amount; but not so as to the right,—Glover *v.* The North Staffordshire Railway Company, 16 Q. B. 912 (E. C. L. R. vol. 71): and see The Queen *v.* The London and North Western Railway Company, 3 Ellis & B. 443 (E. C. L. R. vol. 77.) Under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 68, the jury determine the amount of injury done to the land, but do not interfere with the title. So, as to rights of way or water, the jury assume the existence of the right, and assess only the compensation for its invasion or destruction. Here, the plaintiffs did not cease to work in consequence of the company's notice, but in virtue of their covenant. The only persons who under the circumstances could call upon the company for compensation were the lessors, the parties entitled to the reversion.

Gray was not called upon to reply.

WILLIAMS, J.—I am of opinion that our judgment must be for the plaintiffs. The questions arise upon the demurrers to the fourth, fifth, and sixth pleas; and I am of opinion that those pleas are severally bad. The fourth plea in substance states, that, in and by the lease under which the plaintiffs claim to be owners of an estate in the minerals in question, the plaintiffs covenanted with the lessors that they would without inter-
*277] mission or delay work the mines thereby demised, *and raise and get coal and ironstone thereout, until the whole of the said mines, or as great a quantity thereof as by working the said mines in a diligent and effectual manner could or might be gotten, should be worked out, *except the ribs and pillars which must necessarily or which the lessors might require to be left.* It then goes on to allege that the minerals which the plaintiffs so ceased and abstained from working, and the said coal and ironstone which they so left ungotten, were a rib within the meaning of the said covenant, and that, before the time when the plaintiffs first ceased and abstained as in the declaration mentioned, the lessors required the said minerals, &c., above mentioned to be left by the plaintiffs under the said covenant, as and for such rib as aforesaid, and of such their requirement duly gave notice to the plaintiffs. On the part of the defendants, it is said that this plea shows that there was a covenant, as between the plaintiffs and their lessors, which prevents the plaintiffs from having such interest in the minerals in question as could be submitted to a jury for an assessment of compensation. The first question which presents itself is, whether this does amount to a covenant. I feel a difficulty in saying, as far as we can learn from the plea, that there is any such covenant at all: it seems rather to be an exoneration of the lessees pro tanto from the obligation to work out the minerals. If that be so, it would not deprive the plaintiffs of any right to work out the minerals (or a portion of them) for which compensation is claimed; it would only relieve them from the obligation of working as to those portions which were necessary to be left or which they were required to leave for the support of the superincumbent soil. If that be the true view, there is no covenant, and the foundation of the plea entirely fails.

Assuming, however, that this *does amount to a covenant, then, what is the covenant? If it means, as it seems to me that it must [*278 be taken to mean, that the lessors are to have the power, according to their discretion or caprice, to dictate what portion of the mines and minerals demised the lessees shall refrain from working, the question is whether that is not so unreasonable a covenant on the face of it, that, if an application were made to the Court of Chancery to enforce specific performance, it would fail on that ground; or, if a remedy were sought at law for a breach, it would not be an answer to the action for the lessees to say that the quantity they were required to leave unworked was larger than necessary for the support of the surface land; and at all events it would go in mitigation of damages. That being so, if the damages in such an action would not be commensurate with the value of the minerals, and the Court of Chancery would not grant an injunction to restrain the lessees from getting the minerals, it becomes a mere question of amount: and, though I agree with Mr. *Lloyd* that the finding of the jury would not be conclusive as to title, I think it is equally clear that it would be as to amount. Upon the whole, therefore, I am not satisfied that the plaintiffs are under such an obligation to their lessors, that, if the latter were to insist upon it, the plaintiffs would be prevented from working out the minerals in question, or be liable in damages if they did so. Still, however, there remains another question, as to which I have entertained very considerable doubt, viz. whether the defendants are entitled to set up the jus tertii. That which the defendants are seeking to set up as an answer to this action, is, a right which the grantors have under the mining lease, which they may or may not insist upon. It is unnecessary, however, to consider that, because on the other points I am clearly of opinion that the fourth plea cannot be supported.

*The fifth and sixth pleas are founded upon an alleged breach of the statute by the plaintiffs. The fifth plea states that the [*279 plaintiffs did not cease and abstain from working the said minerals within twenty yards of the tunnel, as alleged. It is contended on the part of the defendants, that the plaintiffs have precluded themselves from claiming compensation because they did not abstain from working the minerals within the prescribed distance of the tunnel, according to the notice. It would be a strong thing to say, that, if the plaintiffs had worked any portion of the minerals within the twenty yards, they thereby forfeited all their rights under the notice. It seems to me that the meaning of the statute is, not that in case the owners after giving notice proceed to work the minerals mentioned therein they shall lose all claim for compensation, but that the company should have a remedy by action against the plaintiffs for working contrary to the statute, or that the company might have a right to claim a reduction in the amount of compensation when fixed by the jury, to the extent of the value of the minerals so improperly taken. It is unnecessary to say which of these would be the proper remedy. As to the other ground alleged in the sixth plea, viz. that, after the plaintiffs caused to be served the notice in the declaration first mentioned, and after the defendants refused to permit the plaintiffs to work the mines mentioned in the said notice, or any part thereof, &c., the plaintiffs withdrew, abandoned, and waived the first-mentioned notice, and all their rights and powers thereunder, and claimed to work and did work the minerals in the notice mentioned,—I

think the plea as to that is insufficient, because I think that the notice, once given, cannot be abandoned. I give no opinion as to how it would have been if the notice had been withdrawn by mutual consent. Upon
*280] the *whole, it seems to me that neither of the pleas can be supported, and therefore that there must be judgment for the plaintiffs.

WILLES, J.—I am of the same opinion. With reference to the fourth plea, the question is whether, as between Lord Dudley and Ward and the plaintiffs, there was any equitable exception in favour of the former of the minerals in respect of which the compensation sought to be recovered in this action was assessed by the jury. That plea in effect states that the plaintiffs had no interest in the property in respect of which the compensation was assessed. As to that question, these remarks arise. If the land, and the mines and minerals under it, and the right to work them, pass by the lease, we must look to the lease to see what the rights of the lessees under it were. As set out in the declaration, it purports to be a demise in the ordinary form of the mines of coal therein described, with power to the lessees to work and dispose of for their own benefit the produce of the said mines for the term of twenty-one years, at certain rents and royalties. Then, let us see what is the covenant set out in the plea. It is a covenant, for the benefit of the lessors, that the lessees shall work the mines so that royalties shall accrue to the owners during the term. The words are, that the lessees, their executors, &c., "shall and will, at their own costs and charges, continue without intermission or delay to work the said mines thereby demised, and raise and get coal and ironstone thereout until the whole of the said mines, or as great a quantity thereof as by working the said mines in a diligent and effectual manner could or might be gotten, should be worked out, *except the ribs and pillars which must necessarily be left or which the said lessors might require to be left.*" That is a cove-
*281] nant for the benefit of the lessors: and *the exception so much relied on for the defendants is an exception out of the covenant in favour of the lessees. It is not the place where one would look for a covenant by the lessees. Now, there are two constructions which may be put upon these words, "which the said lessors might require to be left." Either they were introduced in ease of the lessees, in order to absolve them from their obligation by virtue of their covenants in the lease to work all the mines effectually,—for, but for the exception, although they should have abstained from working by reason of their having received notice to do so from the lessors, they might still have been liable to be sued upon their covenant fully to work the mines; and it may be that this was intended to prevent the necessity of an absolution under seal in each case. The other construction is that contended for by Mr. *Lloyd*, who suggests that the words we are dealing with mean that the lessees are to have the right to work all the minerals except such parts as the lessors shall have a right to require to be left unworked. That, however, appears to me to be an exceedingly strained construction. You have first a general power given to the lessees to work all the mines; and, secondly, you have words which, if construed as the defendants suggest they ought to be construed, amount to this, that the lessees shall only be entitled to work such portions of the mines as the lessors may not require them to leave unworked. I am unable

to bring myself to adopt that construction: and I agree with my Brother Williams that we ought not to imply here such a covenant. I may further observe, that, if it had been intended to impose such a limitation upon the rights of the lessees, it would unquestionably have been contained in a distinct and substantive clause. Assuming that we are bound to imply a covenant from these words, what sort of *covenant is to be implied? I should feel inclined to adopt the course taken by this court in the case I referred to in the argument, Doe d. Rogers *v.* Price, 8 C. B. 894 (E. C. L. R. vol. 65). There, a lease was granted of a farm and tenement, and the quarries of paving and tilestone in and upon the premises, with liberty and power to open and work the quarries, subject to an annual rent for the premises, excepting the quarries, and to the payment of a royalty for the stone obtained. Out of this demise were reserved and excepted "all timber-trees, trees likely to become timber, saplings, and all other wood and underwood which then were, or which should at any time thereafter be, standing, growing, and being on the premises, and all mines, minerals, &c., which should thereafter be opened and found." And the lease contained a covenant "not to commit any waste, spoil, or destruction by cutting down, lopping, or topping any timber-trees or trees likely to become timber, saplings, or any other wood or underwood;" and a power of re-entry for non-payment of rent, or if the lessee, &c., should commit any waste, spoil, or destruction by any of the means or ways aforesaid, and should not perform and keep all and singular the covenants, &c., contained in the lease. The assignee of the term having cut down and grubbed up certain saplings, wood, and underwood, *for the necessary purpose of working a quarry on the demised premises*,—it was held that the effect of the covenant was, that the lessee should not so cut any of the trees excepted, as that such cutting should amount to an excess of the right which it was intended that he should exercise; and therefore that cutting trees in a manner necessary to a reasonable exercise of the power to get the stone was no breach of the covenant. So, here, if any covenant is to be implied, it must be a covenant not to remove the *ribs or pillars which must necessarily be left, or which the lessors might reasonably require to be left, for the future protection of the upper soil. The requirement stated in the fourth plea is an absolute requirement by Lord Dudley and Ward, the person then entitled to the reversion, and not such a reasonable requirement as he was entitled under the covenant to make. It appears to me, therefore, that this plea is not well founded. The fifth plea raises an entirely different point. It alleges that the plaintiffs did not cease and abstain from working the said minerals within twenty yards of the tunnel, as alleged. In substance it amounts to this, that some portion of the coals and minerals were taken away from the spot indicated by the persons now claiming compensation for being prevented from getting it. It appears to me to be much more reasonable to hold that this should be the subject of a cross-action, than that it should be allowed to defeat the proceedings under the statute for compensation. The same remark applies to the first part of the sixth plea. And, as to the alleged abandonment by the plaintiffs of their notice, that is stated to have taken place after the service of the notice and before the information to the commissioners. But, in the mean time, those circumstances had

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occurred which gave the plaintiffs a right to have the compensation assessed: and the plea merely states that the plaintiffs waived and abandoned the notice, not that the defendants assented to such waiver and abandonment. For these reasons, I concur with my Brother Williams in thinking that our judgment should be for the plaintiffs upon these demurrers.

I ought to add that my Brother Byles, who has been obliged to go to Chambers, desired me to signify his concurrence also.

*284] *KEATING, J.—I also concur in the opinions expressed by the rest of the court. My two learned Brothers have gone so fully into the matter that I think it quite unnecessary to add anything.

Judgment for the plaintiffs.

THOMPSETT and Wife *v.* BOWYER. *Nov.* 3.

A summons to refer a cause was endorsed "By consent, order upon the usual terms." The order having been drawn up without a power in the arbitrator to amend, a judge at Chambers made a subsequent order to amend it by inserting that term:—Held, that such last-mentioned order was properly made.

THIS was an action upon a promissory note given by the defendant to the female plaintiff before marriage. The cause being at issue, the defendant applied for an order to refer it to a master under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 3. The plaintiffs, however, preferring a reference to a barrister, this course was assented to by the defendant, and the summons was endorsed "By consent of all parties, order *upon the usual terms.*" The order was drawn up by the judge's clerk according to the usual printed form adopted at Chambers, containing no clause empowering the arbitrator to amend.

At the hearing before the arbitrator, the plaintiffs' case being closed, certain objections were urged on the part of the defendant, which induced the plaintiffs' counsel to ask the arbitrator to amend the record. This he declined to do, as the order gave him no such power; whereupon a summons was taken out before Willes, J., to amend the order of reference by inserting a power to amend. The summons was opposed by the defendant, but the learned judge made the order as prayed.

*285] *Raymond*, on behalf of the defendant, now moved *for a rule to show cause why this last-mentioned order should not be set aside, on the ground that the learned judge had no jurisdiction to make it.—This was a reference *by consent*,—simply an agreement between the parties. Neither the court nor a judge had power to vary or in any manner interfere with that agreement. [WILLIAMS, J.—The consent of the parties was, to refer on the usual terms. Does not that include a power to amend?] Where the reference is by order of nisi prius, it may; but not in a case like this. At all events the order was not amendable. In Rawtree *v.* King, 5 J. B. Moore 167 (E. C. L. R. vol. 16), it was held, that, if all matters in difference *in the cause* are agreed to be referred, and the associate by mistake draws up the order of reference generally as to all matters in difference between the parties, it cannot be amended, but the parties must go down to another trial. So, in Ashworth *v.* Heathcote, 6 Bingh. 596 (E. C. L. R. vol. 19), 4 M. & P.

396, a cause in which there was no notice of set-off having been referred by order of nisi prius, the judge, during the assizes, made a second order to enable the defendant to give a particular of set-off: and it was held that the statute 1 G. 4, c. 55, did not authorize this second order. Tindal, C. J., there says: "This was a reference of a cause at nisi prius, that is, of the cause as it then stood, without any particular of set-off, after a notice to deliver one,—which is the same as if there had been no notice of set-off. After the reference, the judge made an order that a particular of set-off might be delivered, which was virtually to put the defendant in a situation, circumstanced as the cause then was, in which he had no right to stand. The judge could not remedy the consequences of the defendant's neglect; and the making this rule absolute will occasion no injustice, for, the party will stand in the same situation as if he had gone to a jury." *Again, in Winn *v.* Nicholson, 7 C. B. 819 (E. C. L. R. vol. 62), by an order of reference made by consent, it was stipulated, amongst other things, that certain items in an account annexed to the order should be taken as admitted between the parties. The arbitrator having made his award,—the court refused to amend the order, and refer the matter back, upon affidavits showing a mistake by the clerk of the plaintiff's attorney in the copying of one of the admitted items. That was an exceedingly strong case. "It appears to me," said Wilde, C. J., in giving judgment, "that the court has no power to accede to this application. No authority has been shown for it. The only case that is at all analogous is that of Evans *v.* Senor, 5 Taunt. 662 (E. C. L. R. vol. 1); and that is very distinguishable. There, the defendant had entered into a rule of court whereby he contracted to sell certain premises to the plaintiff, and he afterwards refused to convey. No application was made to the court to amend the order of reference, by inserting therein words amounting to an undertaking on the defendant's part to convey. I observe that the words of Lord Chief Justice Gibbs are confined to so much of the application as relates to the execution of a conveyance. He says that the court "cannot add anything which requires the consent of the parties; but they can add that which the parties in the legal effect of their contract assented to: and we do not think we make a very wide stretch of authority in saying, that, if the rule is that the plaintiff shall become a purchaser of the premises upon payment of the price named, it involves the term that the vendor shall convey to him that for which he is to pay the money.' Nothing whatever is said about making title. The court thought they were only adding that which was already substantially embodied in the order, or necessarily consequential to what was expressed in *it, and essential to render the order effectual." [WILLIAMS, J.—That is precisely the principle upon which my Brother Willes has acted here. He has only added that which he conceived to be already substantially embodied in the original order.] It is not the legal inference from the words used. [ERLE, C. J.—Does not a reference "upon the usual terms" include a power in the arbitrator to amend?] In orders of nisi prius it is so; but not where, as here, the reference is by consent. The court has no power to reform an instrument so made. In Morgan *v.* Tarte, 11 Exch. 82,† it was expressly held, that, where a cause is referred to arbitration without power of amendment, a judge has no power, except by consent of the parties, to order the particulars of the

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demand specially endorsed on the writ to be altered by increasing the amount of one of the items. [BYLES, J.—The amendment there sought was an amendment of the original summons; and the reference was not "upon the usual terms."]

ERLE, C. J.—I am of opinion that the order of my Brother Willes was properly made, and consequently that the rule prayed ought not to be granted. This was a reference of the cause by consent, "upon the usual terms." I entirely agree with Mr. *Raymond* to this extent, that the parties to the agreement have a right to make what bargain they please, and that the court has no power to add to or subtract from what they have so mutually agreed. But, here, the reference is "upon the usual terms;" and the duty cast upon us is, to interpret those terms. The plaintiffs insist that one of the usual terms of such a reference, is, that the arbitrator shall have power to amend, as a judge at nisi prius might amend. This the defendant denies. The interpretation which my Brother Willes has put upon the words "usual terms" is the former:

*288] and the *question is whether we ought to adopt that interpretation. I certainly do not find any very decided authority one way or the other. But I know of my own experience, and I have seen it acted upon many times, that a reference by consent before a judge at nisi prius upon the usual terms does include as one of those terms a power in the arbitrator to make all amendments as the judge himself might have done: and it seems to me that the same interpretation ought to be put upon the same words when used by a judge at Chambers. There is no reason why we should intend a different thing in the one case from that which is intended in the other, or why the fact of the reference taking place at an earlier stage should alter the meaning of the language used. Nobody has ever judicially propounded such a doctrine, and I do not feel inclined to sanction it. I therefore think the order of my Brother Willes was properly made.

The rest of the court concurring, *Raymond* took nothing.

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*289] *JOHN LEGG, Appellant; The Rev. ARTHUR PARDOE, Respondent. *Nov.* 22.

Justices have no power to entertain a complaint for an alleged trespass in pursuit of game, under the 1 & 2 W. 4, c. 32, s. 30, where the defendant sets up a bonâ fide claim of right; and of this the justices are the judges.

AT a petty sessions holden at Bridport, in and for the division of Bridport, in the county of Dorset, on the 25th of September last, before, &c., three of Her Majesty's justices of the peace in and for the said county, an information, preferred by John Legg (hereafter called the appellant) against the Rev. Arthur Pardoe (hereinafter called the respondent), under the 1 & 2 W. 4, c. 32, s. 30, charging for that he the said respondent, on the 12th of September then instant, at Hook, in the said county, did commit a trespass, by entering or being in the day-time on land in the occupation of the appellant in search or pursuit of game or rabbits, contrary to the statute in that case made and provided, was heard and determined by us, the said parties respectively being then

present; and upon such hearing we dismissed the said information, under the belief that we had no power to adjudicate on the charge, the defendant having set up a right to be and enter on the said premises by leave and license of a party to whom the right of sporting was supposed to have been delegated. And whereas, the appellant, being dissatisfied with our determination on the hearing of the said information as being erroneous in point of law, hath, pursuant to the 20 & 21 Vict. c. 43, s. 2, applied to us in writing within three days after the said determination to state and sign a case setting forth the facts and the grounds of such our determination for the opinion thereon of Her Majesty's Court of Common Pleas: Now, therefore, we the said justices, in compliance with the said application of the appellant, and the provisions of the statute *aforesaid, do hereby state and sign such case, as follows:—

At the hearing of the aforesaid information, it was proved on [*290 the part of the informant (the appellant in this appeal), that he resided at Hook, in the said county; that he rented a field called Ragg's Close, part of the manor of Hook, with other lands there, of Mr. James Mintern; that the game and rabbits on such land were not in any way reserved, and that his landlord, who himself was a lessee of the said lands, gave him the right over the same; that no one had any right to enter or be on any such lands in search or pursuit of game or rabbits without his, the appellant's, leave; that, on the 12th of September last, the respondent did enter and was on Ragg's Close for that purpose, without the leave of the appellant.

On the part of the defendant (the respondent in this appeal), it was not denied that he was on Ragg's Close for the purpose aforesaid: but evidence was given that he was there shooting by the permission of the Rev. Paulet Mildmay Compton, who stated he had made a parol arrangement with Lord Sandwich for the shooting at Hook, and that he therefore claimed the right.

Not the least evidence was offered to show that Lord Sandwich had any right or claim to the shooting over the lands in the appellant's occupation, or that the landlord, Mr. Mintern, could not give the game and rabbits to the appellant.

No evidence was given that the respondent had any game-certificate or other license to sport authorizing him to shoot or search for game and rabbits.

The respondent's attorney submitted that the magistrates had no right to adjudicate on the charge, for that the respondent acted under a supposition that he had a right to do the act complained of, and that, the *trespass not being wilful and malicious, their jurisdiction was [*291 ousted under the 7 & 8 G. 4, c. 30, s. 24.

The appellant's attorney contended that nothing whatever was shown to take away the jurisdiction of the justices, and that they ought to convict, especially as there was an entire absence of evidence that the defendant had a game-certificate, and he could not therefore be supposed to have any right to sport at all, or to do the act complained of, and should therefore be deemed to be in the position of an ordinary poacher.

The justices, however, being of opinion that the respondent, in committing the said trespass on the said close, did so in pursuance of the permission of the said P. M. Compton, who he believed was entitled to the right of sporting thereon, gave their determination against the

appellant in the manner before stated, conceiving that there was a question of right between the parties which they as justices had no power to adjudicate on.

The question of law arising on the above statement, was, whether they were, as justices, empowered in law and ought to have convicted the respondent in respect of the said trespass? Was their jurisdiction taken away, and were they empowered to make the order against the appellant dismissing the information? or, were there no circumstances or evidence before them depriving them of their right to adjudicate, and ought they to have exercised jurisdiction as justices, and to have convicted the respondent?

Whereupon the opinion of the Court of Common Pleas was asked upon the said question of law, whether or not they, as justices, were correct in their determination as aforesaid, and as to what further should be done or ordered by the said court in the premises.

*292] *Kingdon*, for the appellant.—This question has already been before the courts on more than one occasion. It arises upon the 30th section of the 1 & 2 W. 4, c. 32, which enacts, "that, if any person whatsoever shall commit any trespass by entering or being, in the day-time, upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, such person shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money not exceeding 2*l.* as to the justice shall seem meet, together with the costs of the conviction" (or, not exceeding 5*l.* each, if to the number of five or more together): "Provided always, that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass; save and except that the leave and license of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor, or other person shall have the right of killing the game upon such land by virtue of any reservation or otherwise, as hereinbefore mentioned; but such landlord, lessor, or other person, shall, for the purpose of prosecuting for each of the two offences herein last before mentioned, be deemed to be the legal occupier of such land, whenever the actual occupier thereof shall have given such leave or license; and that the lord or steward of the crown of any manor, lordship, or royalty, or reputed manor, lordship, or royalty, shall be deemed to be the legal occupier of the land of the wastes or commons within such manor, lordship, or royalty, or reputed manor, lordship, or royalty." Two questions arise,—first, whether the respondent did set up a bonâ fide claim of title,—secondly, if he did, was the jurisdiction of the magistrates under this peculiar act of parliament thereby ousted. In The Queen *v.*

*293] *Cridland, 7 Ellis & B. 853 (E. C. L. R. vol. 90), at the hearing of an information under this statute, a bonâ fide claim of title to the land was set up on behalf of the defendants, but no evidence was offered of the actual existence of any dispute, or of any title in the person under whom the defendants claimed. Lord Campbell there said: "Though no evidence of title was actually offered, it was quite clear that a bonâ fide claim of title was set up: and when such a claim is so set up, it seems to me that justices have no longer jurisdiction to proceed to a summary conviction." And the other judges intimate a similar opinion. The question also arose before this court in Morden, app.,

Porter, resp., 7 C. B. N. S. 641 (E. C. L. R. vol. 97). [WILLIAMS, J. —We found it unnecessary to decide the point there; but my Brother Willes and myself expressed an opinion, that, if the party was guilty of a trespass, he was liable to be summarily convicted under the act.] There is no doubt the party here bonâ fide believed he had a right to shoot over the land: but the question is whether that affords any excuse. The matter was considered in Calcraft *v.* Gibbs, 4 T. R. 681, 5 T. R. 19, where it was held to be no defence, in debt for penalties on the game laws, that the defendant acted bonâ fide as gamekeeper of the manor in which the offence was committed, under a deputation from a person claiming a right to appoint the gamekeeper; there being no ground for the claim. Lord Kenyon there says: "It has been said that the defendant acted bonâ fide, and therefore had not incurred the penalty of the statute. The servant, indeed, chose to trust to what his master told him upon the subject: but, as the master had no right to the manor, or even colour of title, it is no justification to the servant." In The Queen *v.* Cridland, Crompton, J., says: "The general rule of law is, that, upon such a claim bonâ fide arising, justices are ousted of their *jurisdiction to convict summarily. In Paley's Law and Practice [*294 of Summary Convictions, 3d edit. p. 28, it is said, 'Where property or title is in question, the jurisdiction of justices of the peace to hear and determine in a summary manner is ousted, and their hands tied from interfering, though the facts be such as they have otherwise authority to take cognisance of.' The editor mentions this rule as not arising from any legislative enactment, but as the old legal maxim applicable to summary trials in general. Being an old maxim of law, which has been so generally applied for ages, we must assume that it is still intended to be applied by every act relating to such matters, though not specifically mentioned. I cannot think that the provision in s. 30 of the 1 & 2 W. 4, c. 32, is intended to abrogate that great principle of law in the case of trespasses in pursuit of game." [KEATING, J.—The 38th section empowers the justices to award imprisonment with hard labour if the penalty is not paid.] Under the Malicious Trespass Act, 7 & 8 G. 4, c. 30, s. 24, the case of a party trespassing under a fair and reasonable supposition of right, or in pursuit of game, was excepted. Here, there was no bonâ fide claim of title: there was no evidence that the Rev. Mr. Compton had any title. [BYLES, J.—In Cattell *v.* Ireson, 1 Ellis, B. & E. 91 (E. C. L. R. vol. 96), Lord Campbell, referring to s. 23, says that the information is meant to be a criminal proceeding for an offence.] Assuming it to be a crime, that makes no difference. The 30th section, however, treats it as a mere trespass; and s. 46 gives the owner or occupier of the land the option of proceeding by an action of trespass. [WILLIAMS, J.—By s. 12, the tenant is liable to a penalty of 2*l.* for killing game, where the right has been reserved by the lessor: suppose he mistakenly supposes that his lease gives him a right to the game, is he liable to be convicted under *this act?] The party summoned is bound to prove that which would amount to a defence [*295 in an action at law for the same trespass: he must prove actual title. The 30th section commences with a very important recital, viz., that "game will become an article which may be legally bought and sold, and it is therefore just and reasonable to provide some more summary means than now by law exist for protecting the same from *trespassers*;"

and the 35th section provides that "the aforesaid provisions against trespassers and persons found on any land, shall not extend to any person hunting or coursing upon any lands with hounds or greyhounds, and being in fresh pursuit of any deer, hare, or fox already started upon any other land, nor to any person bonâ fide claiming and exercising any right or reputed right of free-warren or free-chase, nor to any gamekeeper lawfully appointed within the limits of any free-warren or free-chase, nor to any lord or any steward of the crown of any manor, lordship, or royalty, or reputed manor, lordship, or royalty, nor to any gamekeeper lawfully appointed by such lord or steward within the limits of such manor, lordship, or royalty, or reputed manor, lordship, or royalty." All others are trespassers, unless they can show that which would amount to a defence to a civil action. Considerable light is afforded by the 42d section, which provides that "it shall not be necessary, in any proceeding against any person under this act, to negative by evidence any certificate, license, consent, authority, or other matter of exception or defence, but that the party seeking to avail himself of any such certificate, license, authority, or other matter of exemption, shall be bound to prove the same." In Regina *v.* Woodrow, 15 M. & W. 104,† it was held that a dealer in and retailer of tobacco is liable to the pen-
*296] alty of 200*l.* imposed by the 5 & 6 Vict. *c. 93, s. 3, for having in his possession adulterated tobacco, although he had purchased it as genuine, and had no knowledge or cause to suspect that it was not so. [BYLES, J.—Absence of guilty knowledge was held to be no excuse, in the case of dangerous goods sent by railway, in violation of the 158th section of the Great Western Railway Act, 5 & 6 W. 4, c. cvii.,—Hearne, app., Parton, resp., 28 Law J., M. C. 216.]

Karslake, for the respondent.—The justices being satisfied that there was a bonâ fide claim of title,—which was a question for them,—they had no jurisdiction to entertain the complaint. [WILLIAMS, J.—Have you any case, independent of the statute, where a bonâ fide *claim* of title has been held sufficient to oust the jurisdiction of the magistrates?] In The Queen *v.* Cridland, 7 Ellis & B. 867 (E. C. L. R. vol. 90), Lord Campbell says: "Though no evidence of title was actually offered, it was quite clear that a bonâ fide claim of title was set up: and, when such a claim is so set up, it seems to me that justices have no longer jurisdiction to proceed to a summary conviction." [ERLE, C. J.—There was no actual legal evidence: but the facts were well known, and were assumed to have been proved.] Speaking of the statute, in that case, Erle, J., says: "I strongly incline to the opinion that the true meaning of the statute is, that the justices ought to try whether the defendant entertained an honest belief that he had a title; and, if he had such belief, he ought not to be convicted. I think that in a criminal statute trespass means an intended trespass. In Regina *v.* Burnaby, 2 Lord Raym. 900, it seems to have been held, that, in matters of summary proceeding, where a party charged makes an honest claim of title, the proper course is at once to dismiss the information. The question
*297] in that *case arose in a curious way. A conviction for robbing orchards and cutting trees was removed by certiorari into this court; and it was proposed to put in a plea to the conviction, suggesting a title in the defendant. Powell, J., refused to allow the plea, in these terms: 'If they had not jurisdiction, as I take it they have not where

property is in question, then an action lies against the maker and him that executes the conviction; and that is the party's proper remedy and the proper method to bring this matter into question.' Powys and Gould agreed; and those were judges who weighed carefully their words. Holt, C. J., would have allowed the plea, but agreed without doubt, if the defendant had but a colour of title, the justices had no jurisdiction in the cause. All, therefore, agreed that justices ought to dismiss a summons which is to result in a summary conviction, immediately on being convinced that the case involves a bonâ fide claim of title to real estate." The question is, not whether a legal title really existed, but whether there was a bonâ fide *claim* of title. The justices are not to have a deed brought before them. The statute deals with a great many matters touching game: trespass in one section may well mean something very different from trespass in another section. In Cattell *v.* Ireson, 1 Ellis, B. & E. 91 (E. C. L. R. vol. 96), a proceeding under s. 23 was held to be so far a "criminal proceeding" that the party was precluded from giving evidence for or against himself. "It is not," says Lord Campbell, "like the case of an order in bastardy, where the mother takes the proceeding for the purpose, not of punishing the immorality, but of obtaining support for the child: nor is it like a fiscal proceeding, nor like a proceeding for a civil right, nor like a proceeding before a magistrate for a wrong done to the party applying." [WILLIAMS, J.—Suppose one goes on the land for the purpose of shooting with the *permission of the occupier, believing the latter to have power to [*298 grant such permission,—would he be liable to be convicted under this statute, if the magistrates believed him to be ignorant of the occupier's want of authority to give the permission?] That was the question which this court had before it in Morden, app., Porter, resp., but which they declined to decide. If that would not be a defence, it is by reason of the express words of the statute. Assuming this to be a criminal offence, the burthen of showing it to be within the statute lies on the appellant. "Actus non facit reum, nisi mens sit rea," is a maxim of universal application. Ignorance of the law, undoubtedly, affords no excuse; but a bonâ fide claim of title ousts the jurisdiction of the justices. [ERLE, C. J.—I do not assent to the doctrine that all offences under the act are to be dealt with as criminal offences, because in one case it is provided that imprisonment with hard labour may be inflicted for non-payment of the penalty. BYLES, J., referred to s. 11, which enacts, "that, where the lessor or landlord shall have reserved to himself the right of killing the game upon any land, it shall be lawful for him to authorize any other person or persons who shall have obtained an annual game certificate to enter upon such land for the purpose of pursuing and killing game thereon." WILLIAMS, J.—The Annual Mutiny Act(*a*) enacts that "every officer who shall, without leave *in writing* from the person or persons entitled to grant such leave, take, kill, or destroy any game or fish in the United Kingdom of Great Britain and Ireland, shall for every such offence forfeit the sum of 5*l.*" I apprehend the party would be liable to be convicted under that act, if he relied on an oral license. Every man is bound to know the law.] Ignorantia juris, non excusat: 1 *Co. 177. In Hughes *v.* Buckland, 15 M. & W. 346,† 3 D. & [*299 L. 702, A., who was fishing near a private fishery, had his nets

(*a*) See 23 Vict. c. 9, s. 87; 24 Vict. c. 7, s. 88.

seized, and was taken into custody by the owner of the fishery, under the provisions of the 7 & 8 G. 4, c. 29, ss. 35, 63, who, in doing so, acted under a bonâ fide and reasonable belief that the spot where the arrest and seizure took place was within the limits of the fishery: and it was held that he was entitled to notice of action and the other protection granted by that section. It is important that these questions of title should not be submitted to the decision of the magistrates.

Kingdon, in reply.—Before the passing of the 1 & 2 W. 4, c. 32, there was no statutory provision against the offence of trespassing in the day-time in pursuit of game, with one exception. The only remedy the owner of the land had was by an action of trespass. There was a provision against trespassing in the night-time in pursuit of, and also against the killing of game. The 24th section of the Malicious Trespass Act, 7 & 8 G. 4, c. 30, contained a proviso that "nothing therein contained should extend to any case where the party trespassing acted under a fair and reasonable suspicion that he had a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game, but that every such trespass should be punishable in the same manner as before the passing of that act,"—that was, by action only. That statute did not reach persons who were not actuated by malice, or who acted under a reasonable belief that they were justified in doing as they did. [BYLES, J.—Who were the judges of the reasonableness?] The magistrates. [KEATING, J.—It has been so decided.] The object of the present act was, *300] to give a more summary remedy for these trespasses than *before existed. Here, the justices do not say that a bonâ fide claim of title was set up: they used the word "supposed," which leaves the matter in ambiguity. There is nothing on the face of the case to show that there was any title either in Mr. Compton or Lord Sandwich. Under the County Court Acts, it has always been held that the jurisdiction was not ousted until the judge has satisfied himself that there was a real claim of title. So, to justify the magistrates in refusing to convict under this statute, there must be at least some colour of title. None is shown here. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court:—

As we understand the statement of facts in this case, the justices dismissed the summons because in their judgment a question of title was raised bonâ fide. They state they gave their determination, "conceiving that there was a question of right between the parties which they had no power to adjudicate on." On this ground we affirm their decision.

If a question of title was bonâ fide raised, they took the right course in dismissing the complaint, according to The Queen *v.* Cridland, 7 Ellis & B. 853 (E. C. L. R. vol. 90), and Morden, app., Porter, resp., 7 C. B. N. S. 641 (E. C. L. R. vol. 97).

The facts tending to raise a question of title are extremely scanty; and the case would have been more satisfactory if some further evidence of the title supposed to be in question had been given, so as to ascertain whether Lord Sandwich claimed in respect of the land, or of the manor, or of any other right, and whether there was a colour for the claim. Still, it is a matter which the justices had to determine; and we cannot say they were wrong.

*If the justices wished to raise the question whether the respondent ought to have been discharged merely because he believed he had a right to enter on the land, and so had no intention to trespass, we have not so understood the case. [*301

Our judgment must be for the respondent.

Appeal dismissed.

HENRY EDWARDS FREEMAN, Appellant; WILLIAM READ, Respondent. *Nov.* 23.

Upon an application to justices to enforce payment of a highway-rate pursuant to the provisions of the 12 & 13 Vict. c. 45, s. 5, and 11 & 12 Vict. c. 43, s. 27, notice of appeal was given under the 5 & 6 W. 4, c. 50, s. 105, and recognisances duly entered into. The appeal was entered, and upon the hearing the rate was confirmed, subject to a case: the clerk of the peace made a note in the minute-book of the sessions,—"Costs agreed to be taxed out of court:" the order of the sessions was afterwards confirmed, and the costs were at a subsequent time taxed and allowed at 33*l.* 7*s.*

Nothing was said at the sessions about the costs; but by a rule of sessions made in 1843, it was ordered that "the costs of every appeal tried should be taxed by the clerk of the peace during the same sessions, and be paid by the party against whom the court should decide such appeal, unless the court should then make any order to the contrary:"—

Held, that the magistrates were justified in granting a distress-warrant upon the certificate of the clerk of the peace that the costs had been demanded and were unpaid, although there was no express order of sessions for the payment of costs,—such order being tacitly supplied by the rule of practice known to both parties:

Held, also, that it was not competent to the appellant under the circumstances to object that the taxation had taken place out of sessions, that having been brought about by his own consent.

AT a petty sessions holden at Swindon, in the county of Wilts, on the 16th of February, 1860, before, &c., five of Her Majesty's justices of the peace acting in and for the division of Swindon, in the said county of Wilts, William Read, surveyor of highways of the parish of Swindon aforesaid (hereinafter called the plaintiff), made an application to the justices in pursuance of the provisions of the 12 & 13 Vict. c. 45, s. 5, and 11 & 12 Vict. c. 43, s. 27, to enforce payment by *Henry Edwards Freeman, of Swindon aforesaid (hereinafter called the appellant), and William Woolford, of Swindon aforesaid, of the sum of 33*l.* 7*s.*, being the costs of an appeal by the said appellant to the court of quarter sessions of Wilts against a highway-rate made for the parish of Swindon aforesaid, on which appeal the rate was confirmed, as in the certificate hereinafter mentioned. [*302

In pursuance of a summons issued on the information and complaint of the said plaintiff, requiring the attendance of the appellant and the said William Woolford, the appellant appeared at the said petty sessions, but Woolford did not appear.

It was proved before the justices, that the appellant and Woolford, under s. 105 of the 5 & 6 W. 4, c. 50, duly gave notice of appeal against a highway-rate of the parish of Swindon, and duly entered into recognisances with sufficient sureties before a justice of the peace pursuant to and in the form required by the above-mentioned section of the 5 & 6. W. 4, c. 50, to pay such costs as should be awarded by the justices at the general or quarter sessions; that the appeal was duly entered at the general or quarter sessions of the county of Wilts, held

at Warminster on the 29th of June, 1858, and was on the application of the appellants respited to the then next sessions for the county of Wilts, to be holden at Marlborough on the 20th of October, 1858, when the said appeal was heard and determined; and an entry in the minute-book of the sessions, of which the following is a copy, was at the said sessions made by the clerk of the peace, and which entry was produced to the justices at the hearing of the said information, by James Edward Judd, on behalf of the clerk of the peace, and proved to have been so made by the clerk of the peace, as aforesaid:—

"Wilts, M. 22 Victoria, 1858.
"Townsend and Ormond.
"Henry Edwards Freeman and William Woolford, appellants, against
"The highway-rate of the parish of Swindon.
"9th June, 1858.
"Costs agreed to be taxed out of court.
"Taxed at 33*l.* 7*s.*"

"19th October, 1858. Rate confirmed subject to the opinion of the Court of Queen's Bench on a case to be agreed upon."

The above entry was and is the only entry in the said minute-book made as to the judgment of the court of the result of the appeal at the said quarter sessions; and, save as aforesaid, there was no entry of judgment in the said appeal.

It was proved before the justices that no application was made to the court of quarter sessions or anything said to or by the court on the subject of the costs of the said appeal.

It was proved to the justices, that, on the 14th of April, 1859, and after the said sessions, an appointment for the taxation of the costs of the appeal to the court of quarter sessions was made by the said clerk of the peace, and that the appellants had notice of such appointment, but did not attend, and the costs were then taxed at 33*l.* 7*s.*; and that, afterwards, in the month of June, 1859, the Court of Queen's Bench heard and determined the said case, when the said order of quarter sessions confirming the said rate was confirmed by the said Court of Queen's Bench.

It also appeared that the payment of the said sum of 33*l.* 7*s.* had been demanded of the appellant and Woolford by the plaintiff's solicitor, on the 6th of January, 1860, and that they had not paid the same.

*304] It was proved to the justices that an order or rule of *the said court of quarter sessions was made at the general quarter sessions of the peace held at New Sarum on the 4th of April, 1843, as follows:—"That, from and after the first day of December next, the costs of every appeal tried shall be taxed by the clerk of the peace during the same sessions, and be paid by the party against whom the court shall decide such appeal, unless the court shall then make any order to the contrary;" and that such rule or order was in force and had not been annulled at the time of the hearing of the said appeal.

A certificate of the clerk of the peace was produced before the justices, and received, though objected to by the appellant, which certificate had been applied for by the plaintiff and granted by the clerk of the peace under the 11 & 12 Vict. c. 43, s. 27, and was as follows:—

"Office of the clerk of the peace for the county of Wilts.

"In the matter of an appeal wherein Henry Edwards Freeman and William Woolford were appellants against the highway-rate of the parish of Swindon.

"I hereby certify, that, at a court of general quarter sessions of the peace holden at Marlborough in and for the said county of Wilts, on Tuesday the 19th day of October, 1858, an appeal by the said Henry Edwards Freeman and William Woolford against the highway-rate for the parish of Swindon, in the said county of Wilts, bearing date the 9th day of June then last, came on to be tried, and was then heard and determined: And the said court of general quarter sessions did thereupon confirm the said highway-rate, subject to the opinion of Her Majesty's Court of Queen's Bench upon a case stated: And I do certify, that, at the general quarter sessions of the peace held at New Sarum, in and for the said county, on the 4th of April, *1843, it was ordered as follows, that is to say, that, from and after the 1st [*305 day of December next, the costs of every appeal tried shall be taxed by the clerk of the peace during the same sessions, and be paid by the party against whom the court shall decide such appeal, unless the court shall then make any order to the contrary; and that such last-mentioned order has not since been altered or repealed, and is now in full force: And I also certify, that, upon the trial of the above appeal of Henry Edwards Freeman and William Woolford against the highway-rate of Swindon, the court made no order contrary to the said order of the 4th day of April, 1843; and that the respective solicitors for the appellants and respondent then and there agreed that the costs of such appeal should be taxed by the clerk of the peace out of court: And I further certify that the solicitors of the said appellants having subsequently objected to attend the taxation of such costs, I did on the 14th day of April, 1859, attend the respondent's solicitor, and taxed the costs of the respondent at the sum of 33*l.* 7*s.*, which sum I consider fair and reasonable to be paid to him by the appellants for his costs in and about the said appeal: And I do further certify that the said sum for costs has not, nor has any part thereof, been paid to me. Dated this 7th of February, 1860.

"JOHN SWAYNE, clerk of the peace."

It was proved, that, after the taxation of the said costs, the clerk of the peace had added to the entry of the minute of the judgment of the court of quarter sessions on the hearing of the appeal above set forth, the words "Taxed at 33*l.* 7*s.*," which appeared at the foot of such minute.

Upon this evidence, the plaintiff, William Read, asked the justices to issue a distress-warrant against *the appellant for the said costs; [*306 when it was objected and contended on behalf of the appellant, —first, that, as the appellant had duly entered into such recognisance as aforesaid before a justice of the peace pursuant to the 5 & 6 W. 4, c. 50, s. 105, they the justices had no jurisdiction to enforce payment of the above-mentioned costs by a distress-warrant,—secondly, that no order, judgment, or determination had been made or come to by the court of quarter sessions for the payment of the costs in the matter of the above-mentioned appeal,—thirdly, that the justices had no jurisdic-

tion under the circumstances to issue a distress-warrant for the said costs,—fourthly, that it had not been proved to the justices that a valid or sufficient order or judgment had been made or given by the court of quarter sessions for the payment of costs in the matter of the above-mentioned appeal,—fifthly, that the certificate signed by the clerk of the peace did not certify or show that the court of quarter sessions had ordered the appellant to pay any costs, or directed to whom such costs should be paid; and that such certificate was not in conformity with s. 27 of the 11 & 12 Vict. c. 43.

Whereupon four of the afore-named justices adjudged and determined that a distress-warrant should issue to enforce payment of the said sum of 33*l.* 7*s.*, and 6*l.* costs: and the appellant being dissatisfied, &c., demanded a case.

The opinion of the court was requested, whether, upon the facts above set forth, the justices were right in determining that such distress-warrant should be issued.

Prentice (with whom was *Karslake*), for the appellant.—This was an appeal under the 105th section of the General Highway Act, 5 & 6 W. 4, c. 50, which *enacts, that, if any person shall think himself aggrieved by any rate made under or in pursuance of this act, or by any order, conviction, judgment, or determination made, or by any matter or thing done, by any justice or other person in pursuance of this act, and for which no particular method of relief hath been already appointed, such person may appeal to the justices at the next general or quarter sessions of the peace to be holden for the county, division, riding, or place wherein the cause of such complaint shall arise, such appellant first giving or causing to be given to the surveyor or surveyors, or to such justice or other person by whose act such person shall think himself aggrieved, notice in writing of his intention to bring such appeal, together with a statement in writing of the grounds of such appeal, within fourteen days after such rate shall have been made or cause of complaint shall have arisen, and within four days after such notice entering into a recognisance before some justice, with two sufficient sureties, conditioned to try such appeal at, and abide the order of, and pay such costs as shall be awarded by, the justices at such general or quarter sessions; and such justices, upon hearing and finally determining the matter of such appeal, shall and may, according to their discretion, award such costs to the party appealing or appealed against as they shall think proper; and their determination in or concerning the premises shall be conclusive and binding on all parties to all intents and purposes whatsoever." The 27th section of the 11 & 12 Vict. c. 43 provides, that, "after an appeal against any such conviction or order *as aforesaid* shall be decided, if the same shall be decided in favour of the respondents, the justice or justices who made such conviction or order, or any other justice of the peace of the same county, &c., may issue such warrant of distress or commitment as aforesaid for *execution of the same, as if no such appeal had been brought; and if upon any such appeal the court of quarter sessions shall order either party to pay costs, such order shall direct such costs to be paid to the clerk of the peace of such court, to be by him paid over to the party entitled to the same, and shall state within what time such costs shall be paid: and, if the same shall not be paid within the time so limited,

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and the party ordered to pay the same shall not be bound by any recognisance conditioned to pay such costs, such clerk of the peace, or his deputy, upon application of the party entitled to such costs, or of any person on his behalf, and on payment of a fee of 1*s.*, shall grant to the party so applying a certificate that such costs have not been paid; and, upon production of such certificate to any justice or justices of the peace of the same county, &c., it shall be lawful for him or them to enforce the payment of such costs by warrant of distress," &c. That provision, however, only applies to cases where no recognisances are entered into, and to such convictions and orders as are mentioned in the former part of the act. The 12 & 13 Vict. c. 45, however, contains a provision (s. 5) enabling the sessions to give costs in all cases of appeal. It enacts, "that, upon any appeal to any court of general or quarter sessions of the peace, the court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such court appear just or reasonable, such costs to be recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction, by the 11 & 12 Vict. c. 43." The principal question here is, whether that applies where a recognisance has been entered into; and, next, whether there is any sufficient order here within the meaning of that act. *The very terms of the section show that it is only applicable where there are no [*309 recognisances. Further, there is no order for the payment of costs at all. The order of the quarter sessions is silent as to costs. It appears, that, in 1843,—long before the passing of these statutes,—the then justices in quarter sessions made a general order that "the costs of every appeal tried should be taxed by the clerk of the peace during the same sessions, and be paid by the party against whom the court shall decide such appeal, unless the court shall then make any order to the contrary." It is not competent, however, to any court to make thus a general order which shall regulate every case. The entry as to costs here is made at a different session, and not by the court, but by the clerk of the peace: and the only evidence of the order is the certificate of the clerk of the peace given under the 11 & 12 Vict. c. 43, s. 27. That certificate, however, is only evidence of the facts which the statute says it shall be evidence of, that is, of the order of sessions confirming or quashing the appeal, of the order on the appellant to pay costs, and of their non-payment. There was no evidence before the magistrates of the general order of 1843. Further, the order of sessions does not state to whom the costs are to be paid, whether to the clerk of the peace or to the party. The costs must be taxed at the same sessions, and adopted by the court at the same sessions. In Burn's Justice (edit. 1845, by Chitty), Appeal VII., p. 175, it is said: "Whenever the sessions grant costs, they must ascertain the costs by their order (Ex parte Halloway, 1 Dowl. P. C. 26); for, they have no power to grant costs generally like the courts at Westminster, to be afterwards taxed by the proper officer: they may direct the clerk of the peace to ascertain and report to them the items of the expenditure, which may be the grounds *of their decision, but they must themselves determine the sum [*310 to be paid. Therefore, it has been held that the recorder of a municipal sessions may, on ordering costs, refer the taxation of the amount to an officer of the court; but that such taxation must be

adopted by him during the continuance of the same sessions: The Queen *v.* Long, 1 Q. B. 740 (E. C. L. R. vol. 41), 1 Gale & D. 367; Sellwood *v.* Mount, 1 Q. B. 726, 1 Gale & D. 358:" and see The Queen *v.* The Recorder of Cambridge, 7 Ellis & B. 637 (E. C. L. R. vol. 90). The certificate of the clerk of the peace is no evidence against the appellant. [BYLES, J.—And, if it were evidence, can a distress-warrant issue upon an agreement?] Clearly not: it may be ground for an action. The case of The Queen *v.* The Justices of Merionethshire, 6 Q. B. 163 (E. C. L. R. vol. 51), shows that the justices are bound to exercise a discretion in each case.

Phipson, contrà.—The 5th section of the 12 & 13 Vict. c. 45, enacts, that, "upon *any* appeal to any court of general or quarter sessions of the peace, the court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such court appear to be just and reasonable, such costs to be recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction by the 11 & 12 Vict. c. 43, s. 27." There is nothing in that section to import that it applies to no other cases than those where recognisances have been entered into. The inclination of the Court of Queen's Bench was otherwise in The Queen *v.* Huntley, 3 Ellis & B. 172 (E. C. L. R. vol. 77): and it would render the statute of very little avail if its construction were so narrowed. Then it is said that there has been no order for the payment of these costs. There was, however, an order of the *sessions *311] confirming the rate, and the order of 1843, which was proved to be still in force, that in every case of appeal the costs shall be taxed by the clerk of the peace during the same sessions, and be paid by the party against whom the court shall decide such appeal, unless there be an order to the contrary. The parties here agree that the costs shall be taxed out of court. Is it competent to them afterwards to say that they have not been properly taxed? [BYLES, J.—The parties may be bound by their agreement: but what order of sessions is there that the ascertained sum should be paid?] In The Queen *v.* Mortlock, 7 Q. B. 459 (E. C. L. L. vol. 53), an order for costs on dismissal of an appeal against a poor-rate was made at first without stating the amount, which was left to be ascertained by the clerk of the peace; the justices then adjourned; the costs were taxed, and the amount verbally reported by the clerk of the peace at the adjourned sitting, which was not attended by all the magistrates originally present: and the order was held sufficient. Lord Denman there said: "The result of the evidence is, that the justices dismiss the appeal with costs, and say to the parties,—'The clerk of the peace will settle the amount, and it will be inserted in the order afterwards; are you content?' and they make no objection." [ERLE, C. J.—I observe that Lord Denman in The Queen *v.* Long, 1 Q. B. 740, 746 (E. C. L. R. vol. 41), comes very close upon this case. He says: "If the party to be burthened with costs consents, the judgment may perhaps be given nunc pro tunc, though the taxation be out of sessions. Otherwise, when the sessions are over, the recorder's authority is gone."] The only objection of any weight here is, that there was no formal order: but it is submitted that it is not competent to the appellant under the circumstances to rely on that.

Prentice, in reply.—The argument on the other side *assumes [*312
that there was an agreement between the parties that the costs should be taxed out of court. But the only evidence of such agreement is, the certificate of the clerk of the peace. It is not stated when that agreement was made: and the certificate alone will not do. In The Queen *v.* The Justices of Staffordshire, 26 Law J., M. C. 179, upon an appeal against an order adjudicating the settlement of a lunatic pauper, the sessions at which the appeal was heard confirmed the order, subject to the opinion of the court upon a case to be afterwards stated, nothing being then said as to costs. The appellants afterwards abandoned their intention of stating the case, and at a subsequent sessions the respondents applied for and obtained an order granting them the costs of the appeal: and it was held, upon an application for a certiorari to quash the last-mentioned order, that the sessions at which the appeal was heard and determined alone had jurisdiction to grant costs, and that the order of the subsequent sessions was therefore invalid. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court:(*a*)—

Some of the objections on this appeal need only a short answer. The 12 & 13 Vict. c. 45, s. 5, empowering the sessions to give costs on all appeals, to either party, disposes of the two questions raised by Mr. *Prentice*, whether the order of the sessions was bad under the 11 & 12 Vict. c. 43, s. 27, which does not extend to cases where there is, as here, a recognisance, and which makes provision in respect of paying the costs *to the clerk of the peace. So, as to the point that there was no [*313
adjudication giving costs expressed orally by the court. The answer is, that it was tacitly expressed by a standing order that costs should follow the event unless the court should interpose,—which was a rule of practice known to both the parties: and it was a rule specifically applied to this case by the officer having the authority of the court making the entry ordering costs, with the knowledge of both parties.

As to the remaining objection, that the costs were taxed by the clerk of the peace after the end of the sessions,—although the taxation ought by law to be by the court, still the performance of that duty by its officer, if subsequently adopted by the court, has been often recognised as valid: see The Queen *v.* Mortlock, 7 Q. B. 471 (E. C. L. R. vol. 53), and Sellwood *v.* Mount, 1 Q. B. 726 (E. C. L. R. vol. 41), 1 Gale & D. 358, where it is said that the rule requiring taxation by the court by no means prevents the court from directing their officer to tax the costs, and adopting his taxation as their own act, and inserting the amount in their order. But this must be done by the court before the end of the sessions; and a difficulty was raised in this case, because that settled rule of law had not been complied with. The difficulty, however, is got over by an answer to the objection, in the nature of a personal exception to the appellant, because the defect of allowance during the sessions was brought about by the appellant himself consenting to the delay, and therefore as against him it must be taken to have been properly done. It was on his representation of consent that his opponent altered his position, and allowed the delay. There are authorities for giving effect to the consent of the party in this way. In The Queen *v.* Long, 1 Q. B. 740 (E. C. L. R. vol. 41), 1 Gale & D. 867, where the costs were

(*a*) The judges present at the argument were Erle, C. J., Byles, J., and Keating, J.; Williams, J., being engaged in the Divorce Court.

*314] taxed after the end of the sessions without *consent, Lord Denman observes: "If the party to be burdened with costs consents, the judgment may perhaps be given nunc pro tunc, though the taxation be out of sessions:" otherwise, if there be no consent. In The Queen *v.* The Shrewsbury and Hereford Railway Company, 25 Law Times 65, it appeared that the taxation had been after the end of the session, by consent; and, when the order of sessions was brought up for execution, and the party who had so consented moved to set aside the order on account of such taxation after the end of the session, Lord Campbell refused the rule, saying, "The point now is not whether the sessions had jurisdiction to make this order, but whether the appellants are not precluded by their act from making this objection:" and the court holds that they are. This case is an authority for us to adopt; and on these grounds we are of opinion that this objection fails, and that the appellant cannot take advantage of the deception attempted by his attorneys in disputing that which they had consented to.

We think there was no weight in the objection that the consent was not proved by legal evidence. The clerk certified that there was consent; and, as far as appears on the case, the justices were not wrong in acting on it as an undisputed fact.

Judgment for the respondent, with costs.

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*315] *EDWARD BACKHOUSE the Younger, Appellant; The Churchwardens of BISHOPWEARMOUTH, Respondents.

Nov. 22.

There is nothing in the statutes 7 & 8 W. 3, c. 34, s. 4, 1 G. 1, stat. 2, c. 6, s. 2, or 53 G. 3, c. 127, s. 6, to exclude a Quaker from the operations of the general rule that the summary jurisdiction of justices to enforce payment of a church-rate ceases when a matter of title comes into question bonâ fide before them.

Where money is borrowed by churchwardens for the repair of the parish church in pursuance of the Church Building Act, 59 G. 3, c. 134, s. 14,—*Quære*, whether a rate made for payment in one year of a larger sum than one-tenth of the principal is bad for excess?

The following case was stated for the opinion of the court pursuant to the 20 & 21 Vict. c. 43, s. 2:—

Edward Backhouse the younger, one of the persons called Quakers, was summoned, under the provisions of the statute 7 & 8 W. 3, c. 34, s. 4, before three justices of the peace for the county of Durham, on the 4th of February, 1860, to answer three complaints made by the churchwardens of the parish of Bishopwearmouth, in the county of Durham, and severally dated the 21st of January, 1860,—For that he, having been duly rated and taxed in and by a certain church-rate for the said parish made on the 15th of July, 1858, at ¾*d.* in the pound, in the sum of 16*s.* 1*d.*, and in and by a certain other church-rate for the said parish made the said 15th of July, 1858, at 1¼*d.* in the pound, in the sum of 1*l.* 2*s.*, and in and by a certain other church-rate for the said parish, made the 7th of May, 1859, in the sum of 1*l.* 6*s.* 1*d.*, had refused and neglected to pay such rates within six calendar months then last past, on demand duly made.

As to the two rates of the 15th of July, 1858,—

It was proved on behalf of the respondents, that, on the 15th of January, 1860, Edwin Gray, one of the churchwardens, had demanded these two rates from the appellant, who refused to pay them. On cross-examination, William Acklam, a collector appointed by the churchwardens, proved, that, on the 3d of February, 1859 (more than six calendar months previous to the date of the complaint), he had called at the house of the appellant, and saw and asked a servant for the two rates of ½*d.* and 1½*d.*, but they *were not paid. The appellant, however, did not prove, nor did it appear in any way, that the appellant's servant had ever communicated to him such application, or that he had ever authorized her to refuse payment. [*316

It was urged that a sufficient demand had been made on the 3d of February, 1859: but, under this state of facts, the justices did not consider that there had been a demand and refusal previous to six calendar months before the date of the complaint, so as to oust them of jurisdiction, under Jervis's Act, 11 & 12 Vict. c. 43, s. 11.

As to all the three rates,—

The justices then called upon the appellant to answer the matter of the complaints; whereupon he disputed the validity of all the rates, under the following circumstances, which were proved before the justices:—

The affairs of the parish of Bishopwearmouth have from time immemorial been managed by a vestry called "The ancient select vestry" of the parish of Bishopwearmouth, consisting of the rector (who is ex officio the chairman) and of twelve rate-payers; any vacancy by death or removal being supplied by a majority present at any meeting of the body.

It was not proved to the justices that the churchwardens were members of the vestry ex officio; but, by the minute-book of the proceedings of the vestry, which was produced and given in evidence before them, it appeared that the churchwardens had usually attended the meetings of the vestry.

The parish of Bishopwearmouth was formerly very extensive, and comprised the townships of Bishopwearmouth, Bishopwearmouth Panns, Burdon, Hylton, Ryhope, Silksworth, and Tunstall, and the hamlet of Sunderland near the sea.

In 1719, the hamlet of Sunderland was severed *from it, and created a distinct parish, by an act of parliament passed for that purpose,—5 G. 1, c. xix. Previous to the year 1844, several district churches had been built; and, on the 11th of November, 1844, by an order in council, separate districts were carved out of the original parish of Bishopwearmouth, and assigned to these new churches, by the names of St. Thomas's, St. Andrew's, St. Paul's, Hylton, and Ryhope. And by the operation of the 19 and 20 Vict. c. 104, s. 14, and the acts incorporated therewith, these several districts became, on the passing of that act, on the 29th of July, 1856, separate and distinct parishes, and as such authorized and required to hold distinct vestries, elect their own churchwardens, and levy their own church-rates. [*317

On the 1st of February, 1850, the sum of 600*l.* was borrowed by the ancient select vestry, with the consent of the bishop of the diocese, and for the purposes contemplated by the act in that case made and pro-

vided, by way of mortgage of the church-rates of the then whole parish, under the statute 59 G. 3, c. 134.(*a*)

*318] *From the said 29th of July, 1856, the parish hereinafter called Bishopwearmouth proper has comprised part of the town-

(*a*) The indenture,—a copy of which was annexed to and formed part of the case,—was dated the 1st of February, 1850, and made between William Blackett, George Thompson, William Mallam, and Matthew Lee, churchwardens of the parish of Bishopwearmouth, of the first part, Robert Fenwick, William Bell, John Scott, William Robinson Robinson, Nathan Horn, Ralph Carr, Joseph Young, James Septimus Robinson, William Dawson, Anthony Ettrick, William Ord, and Christopher Bramwell (now constituting the select vestry of the said parish), of the second part, The Right Rev. Father in God, Edward Lord Bishop of Durham, of the third part, The Rev. John Patrick Eden, clerk, rector of the parish church of Bishopwearmouth, of the fourth part, the said John Patrick Eden, Robert Fenwick, and William Robinson Robinson, in their private or individual capacity, of the fifth part, and the said Christopher Bramwell of the sixth part. It recited that the church of the parish of Bishopwearmouth being greatly in want of repair, the said churchwardens, pursuant to the directions of the 59 G. 3, c. 134, entitled, &c., had resolved, with the consent of the several parties thereto of the second, third, and fourth parts, to borrow and raise upon the credit of the church-rates of the said parish the sum of 600*l.*, being the amount considered necessary for defraying the expense of repairing the said church, and that Bramwell had agreed to lend and advance to the said churchwardens the said sum of 600*l.* for the purpose aforesaid upon the credit or security of the said church-rates according to the directions and the true intent and meaning of the said act, and the further security of the covenant of the said John Patrick Eden, Robert Fenwick, and William Robinson Robinson, in their individual capacity thereinafter contained: And it had been agreed that the said sum of 600*l.* should be repaid by six yearly instalments of 100*l.* each, and should bear interest until such repayment at the rate of 5*l.* per cent. per annum. The indenture then witnessed, that, in pursuance of the said recited agreement, and in consideration of the sum of 600*l.* of lawful English money by the said Christopher Bramwell to the said churchwardens at or before the execution of these presents, in hand well and truly paid with the consent of the said several parties thereto of the second, third, and fourth parts (testified by their severally being parties to and executing these presents), the receipt, &c., they the said churchwardens, with such consent as aforesaid, testified as aforesaid, did thereby grant, bargain, sell, assign, and convey unto the said Christopher Bramwell, his executors, administrators, and assigns, All and singular the church-rates of the parish of Bishopwearmouth aforesaid, then due or payable, or which at any time or times hereafter shall become due or payable, from any person or persons whomsoever for or in respect of any messuages, tenements, lands, or other hereditaments within the same parish, To have, hold, receive, and take the said church-rates thereby granted and assigned, or intended so to be, unto and to the use of the said Christopher Bramwell, his executors, administrators, and assigns, subject, nevertheless, to the proviso for redemption thereinafter contained, that is to say, Provided always, and it was thereby agreed and declared, that, if the said churchwardens, or their successors, did and should yearly and every year (the first of such years to be computed from the date thereof) well and truly pay to the said Christopher Bramwell, his executors, administrators, or assigns, one equal sixth part of the said sum of 600*l.* until the whole thereof should be repaid, and at the end of the first and each succeeding year pay to the said Christopher Bramwell, his executors, administrators, or assigns, interest at the rate of 5*l.* per cent. per annum on the said sum of 600*l.*, or so much thereof as should from time to time remain unpaid, according to the true intent and meaning of the said act of parliament and of these presents, then and in such case those presents and everything therein contained should be void: Provided also, that it should be lawful for the said churchwardens and their successors peaceably and quietly to hold and enjoy the said church-rates thereby granted and assigned, until default should be made by them in the payment of the said principal sum of 600*l.* or the interest thereof, or some part thereof, respectively, at the times and in the manner aforesaid: And, in pursuance of the said recited agreement in that behalf, the said John Patrick Eden, Robert Fenwick, and William Robinson Robinson, did thereby, for themselves, their heirs, executors, and administrators, and each of them separately, did thereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said Christopher Bramwell, his executors, administrators, and assigns, that they, the said John Patrick Eden, Robert Fenwick, and William Robinson Robinson, or some or one of them, or the heirs, executors, or administrators of them or some or one of them, should and would well and truly pay unto the said Christopher Bramwell, his executors, administrators, or assigns, all the parts or instalments of the said principal sum of 600*l.* and all the interest for the same principal sum whereof default should be made in payment by the said churchwardens or their successors at the several times there-

ship of Bishopwearmouth, the township of Bishopwearmouth Panns, and the township of Silksworth, but not St. Thomas's, Ryhope, and Hylton, or St. Andrew's.

*The names and residences or places of business of the members of the ancient select vestry in 1850, are set out in the said mortgage-deed as parties thereto of the second part. [*319

In April, 1858, when the respondents were elected churchwardens, and thenceforward until and after the *15th of July, 1858, the following laymen, in addition to the rector, constituted the ancient select vestry, and either resided or had places of business, and were occupiers and rate-payers, in such one of the said several parishes as is in the following list placed opposite their respective names, and in no other of such parishes, viz. [*320

	Names of select vestrymen.	Parish in which resident or rated.
1	Robert Fenwick.	Parish of Bishopwearmouth proper.
2	William Robinson Robinson.	ditto.
3	Nathan Horn.	ditto.
4	Ralph Carr.	ditto.
5	James Septimus Robinson.	ditto.
6	William Ord.	ditto.
7	James Hartley.	ditto.
8	Joseph Young.	St. Thomas's.
9	William Dawson.	Ryhope.
10	Anthony Ettrick.	Hylton.
11	Christopher Bramwell.	St. Thomas's.
12	Christopher Maling Webster.	St. Andrew's.

The respondents Edwin Gray and John James Kayll, both of whom reside in the parish of Bishopwearmouth proper, were elected churchwardens at a meeting of the vestry duly convened and held on the 6th of April, 1858, at which were present The Rev. John Patrick Eden (the rector), and Robert Fenwick, *William Robinson Robinson, Ralph Carr, James Septimus Robinson, Joseph Young, and Christopher Maling Webster, members of the ancient select vestry, and the then churchwardens, Robert Sharp and Edwin Gray. [*321

On the 15th of July, 1858, a meeting of the vestry duly convened was held, at which were present The Rev. John Patrick Eden (the rector), and Robert Fenwick, Nathan Horn, Ralph Carr, James Septimus Robinson, William Dawson, and Anthony Ettrick, members of the vestry, and also the churchwardens, Robert Sharp and Edwin Gray.

At the meeting two rates were levied [made?], one of $\frac{3}{4}d.$ in the pound, and the other of $1\frac{1}{4}d.$ The following is the resolution as to the $\frac{3}{4}d.$ rate:—

"Resolved, that a rate of $\frac{3}{4}d.$ in the pound be laid upon the entire parish of Bishopwearmouth for satisfying the balance still remaining due to Christopher Bramwell (the mortgagee), and the expenses attendant thereon."

The sums then due to Mr. Bramwell were 200*l.* for principal, and 10*l.* for interest.

inbefore appointed for the payment thereof respectively, contrary to the proviso for redemption thereinbefore contained. In witness, &c."

The rate made in pursuance of this resolution was assessed and taxed upon the whole parish of Bishopwearmouth as it existed in 1850, at the date of the mortgage, and before any of the new parishes or districts aforesaid, except Sunderland, had been severed.

The amount on the face of the rate so levied, is, 385*l.* 3*s.* 3½*d.* Evidence was given as to the difference between this sum and the 210*l.* required: and it was proved that the rate so levied would not raise a larger sum than 210*l.*, principal and interest due to Mr. Bramwell, and the expenses of collecting the rate.

The rate is headed as follows:—"An assessment for a church-rate of the parish of Bishopwearmouth, in the county of Durham, and for the purposes chargeable thereon according to law, made this 15th day of

*322] *July, 1858, after the rate of ¾*d.* in the pound, by the ancient select vestry of the said parish. JOHN J. KAYLL, Churchwarden."

The following memorandum is written and subscribed at the end of it:—

"We, the undersigned, being the major part of the members comprising the ancient select vestry of and for the parish of Bishopwearmouth, in the county of Durham, do this 15th day of July, 1858, at our vestry meeting for that purpose duly and legally convened and assembled, rate and tax all and every the inhabitants and parishioners of the parish of Bishopwearmouth aforesaid liable to contribute to a church-rate for and towards the necessary repairs of the church of the parish, and for and towards the providing the necessaries for the decent celebration of Divine service and offices therein, and for and towards the other expenses necessary and legally incident to the office of churchwardens for the current year, the several sums of money hereinbefore mentioned, being a rate or assessment of ¾*d.* in the pound on the annual value of all rateable messuages, lands, tenements, and hereditaments.

"J. P. EDEN. "J. J. KAYLL, } Churchwardens."
"NATHAN HORN. "EDWIN GRAY, }
"J. S. ROBINSON.

The following is the resolution as to the 1½*d.* rate:—

"An estimate having been submitted to the churchwardens of the sum required by a church-rate for the present year,—

"Resolved, that a rate of 1½*d.* in the pound be laid upon all parties within the district of the parish remaining attached to the parish church."

The following is a copy of the estimate in question:—

*323] *"*Estimate of the expenses for the year* 1858.

	£	s.	d.
"1. Sexton's wages, Bishopwearmouth church, also church constable	27	16	0
"2. Cleaning church, galleries, &c.	15	14	7
"3. Bell ringing	13	12	0
"4. Organ blowing	7	0	0
"5. Washing surplices	9	7	9
"6. *Visitation fees and expenses*	4	5	9
"7. Gas	30	18	6
"8. Coals	4	16	10
"9. Attendance on fires	3	19	3
"10. Water-rate	1	10	0
"11. Making out rate-books	7	13	6
"12. Fire insurances	4	16	7

"13. Candles	£1	3	0
"14. Church clock	2	5	0
"15. Sacramental wine and bread	4	0	0
"16. *C. Bramwell, interest*	10	0	0
"17. Copy of registers	5	7	0
"18. Collecting rates, say 260*l.* at 10 per cent.	26	0	0
"19. New surplices and repairing old ones	5	0	0
"20. Stationery, printing, &c.	9	1	4
"21. Masons, joiners, glaziers, slaters, smith's work, brushes, shovels, &c., probable sundry other charges for church expenses not in the above estimate	65	0	11
"22. Door keeping	7	10	0
"Sundries	0	4	4
	£267	2	4

The rate made in pursuance of this resolution was assessed and taxed upon the parish of Bishopwearmouth proper. The amount on the face of the rate is 240*l.* 1*s.* 8½*d.* The rate is headed as follows:—"An assessment for a church-rate of the parish of Bishopwearmouth, in the county of Durham, and for the purposes chargeable thereon according to law, made this 15th day of July, 1858, after the rate of 1½*d.* in *the pound, by the ancient select vestry of the said parish.

"JOHN J. KAYLL, Churchwarden." [*324

And at the end of it is written and subscribed the following memorandum:—

"We the undersigned, being the major part of the members comprising the ancient select vestry of and for the parish of Bishopwearmouth, in the county of Durham, do this 15th day of July, 1858, at our vestry meeting for that purpose duly and legally convened and assembled to rate and tax all and every the inhabitants and parishioners of the said parish of Bishopwearmouth aforesaid, liable to contribute to a church-rate for and towards the necessary repairs of the church of the parish, and for and towards the providing the necessaries for the decent celebration of Divine service and offices therein, and for and towards the other expenses necessary and legally incidental to the office of the churchwardens for the current year, the several sums of money hereinbefore mentioned, being a rate or assessment of 1½*d.* in the pound on the annual value of all rateable messuages, lands, tenements, and hereditaments.

"J. P. EDEN.
"NATHAN HORN.
"J. S. ROBINSON.
"ANTHONY ETTRICK.
"ROBERT FENWICK."

"JOHN J. KAYLL,
"EDWIN GRAY,
"MATTHEW LEE,
} Churchwardens."

As to the rate of 2*d.* in the pound, made on the 7th of May, 1859, the facts were as follows:—

On the 26th of April, 1859, a meeting of the select vestry was held, at which there were present the Rev. J. P. Eden, the rector, Ralph Carr, Robert Fenwick, W. R. Robinson, J. S. Robinson, and C. M. Webster, and the churchwardens, Edwin Gray and John James *Kayll; and these two last-mentioned persons were re-elected churchwardens for the ensuing year. [*325

On the 7th of May, 1859, a meeting of the select vestry duly con-

vened was held, at which were present The Rev. J. P. Eden, the rector, W. R. Robinson, R. Fenwick, C. M. Webster, Ralph Carr, Nathan Horn, J. Hartley, and the churchwardens Kayll and Gray. At this meeting a rate of 2*d.* in the pound was levied on the parish of Bishopwearmouth proper. The following is a copy of the estimate:—

"*Estimate of the expenses for the year* 1859.

	£	s.	d.
"Visitation expenses	4	0	0
"Communion wine	5	0	0
"New surplices, washing surplices, &c.	15	0	0
"Sexton, constable, attendants, cleaning the church, &c.	50	0	0
"Bell-ringers and sundries connected therewith	20	0	0
"Warming and lighting	40	0	0
"Insurance	5	0	0
"Repairs, masons, joiners, painters, smiths, &c.	50	0	0
"Rate-books	16	0	0
"Organ-blowing and tuning	8	0	0
"Petty expenses	10	0	0
"Collecting rate	28	0	0
	£251	0	0"

At the foot of the rate, which on the face of it raises the sum of 401*l.* 12*s.* 5*d.*, the following memorandum is written and subscribed:—

"We, the undersigned, being the major part of the members composing the ancient select vestry of and for the parish of Bishopwearmouth, in the county of Durham, do this 7th of May, 1859, at our vestry meeting for that purpose duly and legally convened and assembled, rate and tax all and every the inhabitants and parishioners of the said parish of
*326] Bishopwearmouth *aforesaid liable to contribute to a church-rate for and towards the necessary repairs of the church of the parish, and for and towards the providing the necessaries for the decent celebration of Divine service and offices therein, and for and towards the other expenses necessary and legally incident to the office of churchwardens for the current year, the several sums of money hereinbefore mentioned, being a rate or assessment of 2*d.* in the pound on the annual value of all rateable messuages, lands, tenements, and hereditaments.

"J. P. Eden, rector. "John J. Kayll, } Churchwardens."
"James Hartley. "Edwin Gray, }
"Nathan Horn.
"Ralph Carr.
"Christr. M. Webster."

All the above three rates were duly allowed and confirmed by the consistorial court of the Bishop of Durham.

Under the circumstances, it was contended by the appellant, that, if the said ancient select vestry ever had a legal existence, it had become defunct by the severance of the parish; and that it was not a legally constituted vestry when the said rates or any of them were levied, because many of the vestrymen were not parishioners of the parish for which the vestry was constituted and acted at the time the rates were made. It was further objected that the churchwardens were not elected nor the rates granted by a legal majority of the select vestry; and other arguments of a similar character were used. It was also objected that the ¾*d.* rate was excessive, and that the 1¼*d.* rate included items not

chargeable upon the poor-rate. It was also urged that the mortgage-debt ought to have been paid off in 1856. For these and various other *reasons, the appellants contended that the said rates were [*327 invalid.

Being of opinion that the three rates were valid upon the face of them, the justices made an order on the appellant to pay the same in terms of the act 7 & 8 W. 3, c. 34, s. 4; at the same time stating that they declined to enter into the question as to the invalidity of the rates by reason of the alleged illegal constitution of the ancient select vestry, either originally, or by reason of the severance of the parish of Bishop-wearmouth, as set out in the case.

The question for the opinion of the court was, whether, under the circumstances above mentioned, the appellant was liable to pay the said three several rates, or any one or more of them, and, if so, which of them?

If the court should be of opinion that he was liable, then the order or orders, as the case might be, was or were to be confirmed.

Wills, for the appellant.—As to the rates made on the 15th of July, 1858, one was an ordinary church-rate; the other assumes to have been made in pursuance of the Church Building Acts, for the purpose of paying the principal and interest of money borrowed for the repair of the church. The borrowing took place under the authority of the 14th section of the 59 G. 3, c. 134, which enacts "that it shall and may be lawful for the churchwardens of any parish, with the consent of the vestry, or persons possessing the powers of the vestry, and with the consent of the bishop and incumbent, and they are hereby authorized and empowered, to borrow and raise upon the credit of the church-rates or of any rates made under the recited (58 G. 3, c. 45) or this act, of any such parish, such sum or sums of money as shall be necessary for defraying the expense of repairing any churches or *chapels; and they [*328 are hereby empowered and required, in any case in which such money shall have been borrowed, to raise by rate a sufficient sum from time to time to pay the interest of the money so borrowed *and not less than* 10 *per cent. of the principal sum so borrowed*, out of the produce of such rates, until the whole of the money so borrowed shall be repaid." In The King *v.* The Churchwardens of Dursley, 5 Ad. & E. 10 (E. C. L. R. vol. 31), 6 N. & M. 333 (E. C. L. R. vol. 36), it was held that the loan ought to be raised at the time when the repairs are done, and the laying of rates for the repayment should commence immediately, and be continued so as to pay off the debt by *ten annual* instalments. And see The King *v.* The Churchwardens of St. Michael, Pembroke, 5 Ad. & E. 603, 1 N. & P. 69 (E. C. L. R. vol. 36). Here, the rate, which seeks to raise 200*l.* in *one year* is clearly excessive. [ERLE, C. J.—This matter was considered in The Queen *v.* The Churchwardens of St. Michael, Southampton, 6 Ellis & B. 807 (E. C. L. R. vol. 88). The lender may have all the principal in one year, provided he has been guilty of no laches.] Here, the deed provides for the payment of the principal money at the rate of 100*l.* per annum: if that had been carried out, the whole debt would have been paid off in 1856; whereas, through the default of the churchwardens, another body of men is now called on to pay the debt. [WILLIAMS, J.—There is no covenant to pay the money, which the lender could enforce.] He might have compelled the church-

wardens, by mandamus, to make a rate. Besides, Bramwell is himself a member of the select vestry. Another objection to this rate, is, that it is made upon the whole parish, including those which had been severed from Bishopwearmouth proper. [ERLE, C. J.—It certainly seems strange that the rate should be made upon the whole parish after the severance, and charged in part on a parish deriving no benefit from the
*329] rate. *WILLIAMS, J., referred to Hughes, app., Denton, resp., 5 C. B., N. S. 765 (E. C. L. R. vol. 94).] By the 71st section of the 58 G. 3, c. 45, the severed district was to remain subject to the repair of the mother church for twenty years. It may be a question, however, whether that liability is not put an end to by the 14th section of the 19 & 20 Vict. c. 104 (passed July 29, 1856), which enacts that "whensoever or as soon as the banns of matrimony and the solemnization of marriages, churchings, and baptisms according to the laws and canons in force in this realm are authorized to be published and performed in any consecrated church or chapel to which a district shall belong, such district not being at the time of the passing of this act a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is by such authority entitled for his own benefit to the entire fees arising from the performance of such offices without any reservation thereout, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of the first-recited act (6 & 7 Vict. c. 37), and the church or chapel of such district shall be the church of such parish, and all and singular the provisions of the firstly and secondly (7 & 8 Vict. c. 94) recited acts (so amended by this act) relative to new parishes, upon their becoming such, and to the matters and things consequent thereon, shall extend and apply to the said parish and church as fully and effectually as if the same had become a new parish under the provisions of the said last-mentioned acts." Another objection to this rate, is, that, although the resolution of the vestry is, to make a rate to pay off the balance due to Bramwell, the heading describes it as being made for a totally different purpose,—viz., "An assessment for a church-rate of the parish of
*330] Bishopwearmouth, and for the purposes chargeable thereon *according to law." By the usual memorandum at the foot of the rate, it is described as being made "for and towards the necessary repairs of the church of the parish, and for and towards the providing the necessaries for the decent celebration of Divine service and offices therein, and for and towards the other expenses necessary and legally incident to the office of churchwarden for the current year." It has been held more than once that this objection is one of substance, and not of mere form. A rate made partly for common law purposes and partly under the Church Building Acts cannot be legally enforced: The Queen *v.* Abney, 3 Ellis & B. 779 (E. C. L. R. vol. 77). The purpose and object of every rate must appear upon the face of it: The Queen *v.* Byrom, 12 Q. B. 321 (E. C. L. R. vol. 64). There, the rate purported by its heading to assess the parishioners "for and towards the repairs of the church *and other incidental charges of the said parish;*" and it was held bad. Lord Denman there says: "The rate appeared by its title not to be a church-rate; for, such a rate must be solely for the purposes of the church; and it cannot otherwise be enforced by summary jurisdiction. By the words 'for and towards the repairs of the church and

other incidental charges of the said parish and hamlet,' I should, if in the situation of the magistrates, have thought I was called upon to enforce something else than the provision for repairs and other needs of the church: and I should have considered this a ground for not interfering. The object of the statute was, to simplify proceedings: to sanction the course here taken would be increasing litigation. The resolution of the vestry should be passed for the purposes of the church only; and that ought to appear on the rate itself." And Coleridge, J., said: "It is new to me to hear the title of a rate spoken of as unimportant. White *v.* Beard, 2 Curt. Eccl. Rep. 480, proves no such *thing. The title is important for two purposes,—to show the objects of the rate, and to show the authority of those who make it." Here, the title is defective in both respects. The common-law rate made on the same day has the same heading and the same memorandum at the foot of it. [If the validity of the rate was disputed, what power had the justices to entertain the application?] It is said that the appellant, being a Quaker, could not contest the validity of the rate in the ecclesiastical court. The statutes applicable to this subject are, the 7 & 8 W. 3, c. 34, s. 4, the 1 G. 1, stat. 2, c. 6, s. 2, the 53 G. 3, c. 127, s. 6, and the 5 & 6 W. 4, c. 74, s. 2. The first of these recites, that, "by reason of a pretended scruple of conscience, Quakers do refuse to pay tithes and church-rates," and enacts, "that, where any Quaker shall refuse to pay or compound for his great or small tithes, or to pay any church-rates, it shall and may be lawful to and for the two next justices of the peace of the same county (other than such justice of the peace as is patron of the church or chapel whence the said tithes do or shall arise, or any ways interested in the said tithes), upon the complaint of any parson, vicar, farmer, or proprietor of tithes, churchwarden or churchwardens, who ought to have, receive, or collect the same, by warrant under their hands and seals, to convene before them such Quaker or Quakers neglecting or refusing to pay or compound for the same, and to examine upon oath, or in such manner as by this act is provided, the truth and justice of the said complaint, and to ascertain and state what is due and payable by such Quaker or Quakers to the party or parties complaining, and by order under their hands and seals to direct and appoint the payment thereof, so as the sum ordered as aforesaid do not exceed 10*l.*; and, upon refusal by such Quaker or Quakers to pay *according to such order, it shall and may be lawful to and for any one of the said justices, by warrant under his hand and seal, to levy the money thereby ordered to be paid by distress and sale of the goods of such offender, his executors or administrators, rendering only the overplus to him, her, or them, necessary charges of distraining being thereout first deducted and allowed by the said justice:" and an appeal to the sessions is given to any person aggrieved by such judgment. The 2d section of the 1 G. 1, stat. 2, c. 6, recites, that, by the 7 & 8 W. 3, a remedy is provided for the recovery of tithes and church-rates where any Quaker should refuse to pay the same, and enacts "that such remedy shall be and is hereby extended, and the like remedy shall and may be had and used against any Quaker or Quakers for the recovering of any tithes or rates, or any customary or other rights, dues, or payments belonging to any church or chapel, which of right by law and custom ought to be paid for the stipend or maintenance of any minister

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or curate officiating in any church or chapel; and any two or more justices of the peace of the same county or place, &c., upon complaint, &c., are hereby authorized and required to summon in writing, under their hands and seals, by reasonable warning, such Quaker or Quakers against whom such complaint shall be made, and after his or their appearance, or upon default of appearance, the said warning or summons being proved before them upon oath, to proceed to hear and determine the said complaint, and to make such order therein as in the said act is limited or directed, and also to order such costs and charges as they shall think reasonable, not exceeding 10*s.*, as upon the merits of the cause shall appear just; which order shall and may be so executed, and on such appeal may be reversed or affirmed by the general quarter *333] sessions of the county *or place, with such costs and remedy for the same, and shall not be removed into any other court, unless the titles of such tithes, dues, or payments shall be in question, in like manner as in and by the same act is limited and provided." The 53 G. 3, c. 127, s. 6,—after reciting, that, by 7 & 8 W. 3, c. 34, s. 4, it is enacted, that, where any Quaker shall refuse to pay or compound for his great or small tithes, or to pay any church-rates, two or more of his Majesty's justices of the peace are authorized to hear and determine the same, not exceeding the value of 10*l.*; that, by the 1 G. 1, stat. 2, c. 6, s. 2, the said act is extended to other objects; and that it is become expedient to enlarge the said sum,—enacts, "that, from and after the passing of this act, all the provisions of the said acts of King William and King George shall be deemed and taken to extend to any value not exceeding 50*l.*: Provided always, nevertheless, that, from and after the passing of this act, one justice of the peace shall be competent to receive the original complaint, and to summon the parties to appear before two or more justices of the peace, as in the said act is set out." Then comes the 5 & 6 W. 4, c. 74, s. 1, which recites, that, by the 7 & 8 W. 3, c. 6, it was amongst other things enacted that two or more of His Majesty's justices of the peace were authorized and required to hear and determine complaints touching small tithes, oblations, and compositions substracted or withheld, not exceeding 40*s.*; that, by the 53 G. 3, c. 127, the jurisdiction of the said justices was extended to all tithes, oblations, and compositions substracted or withheld, where the same should not exceed 10*l.* in amount from any one person; that, by the 7 & 8 W. 3, c. 34, provision was made for the recovery of great and small tithes (not exceeding the amount of 10*l.*) due from Quakers, by distress and sale, under the warrant of two justices; that, by the 1 G. 1, *334] stat. 2, c. 6, the *provisions of the last-mentioned act were extended, in the case of Quakers, to all tithes or rates, and customary rights, dues, and payments belonging to any church or chapel; that, by the 53 G. 3, c. 127, the aforesaid provisions in relation to Quakers were amended, and were also made applicable to any amount not exceeding 50*l.*; and that it was highly expedient, and would further tend to prevent litigation, if, in the cases and with the exceptions thereinafter mentioned, all claimants were restricted to the respective remedies provided by the said recited acts: and it then proceeds to enact, "that, from and after the passing of this act, no suit or other proceeding shall be had or instituted in any of His Majesty's courts in England now having cognisance of such matter, for or in respect of any tithes,

oblations, or compositions withheld, of or under the yearly value of 10*l.* (save and except in the cases provided for in the two first-recited acts), but that all complaints touching the same shall, *except in the case of Quakers*, be heard and determined only under the powers and provisions contained in the said two first-recited acts of parliament, in such and the same manner as if the same were herein set forth and re-enacted; and that no suit or other proceeding shall be had or instituted in any of His Majesty's courts now having cognisance of such matter, for or in respect of any great or small tithes, moduses, compositions, rates, or other ecclesiastical dues or demands whatsoever of or under the value of 50*l.* withheld by any Quaker; but that all complaints touching the same shall be heard and determined only under the powers and provisions contained in the said recited acts of 7 & 8 W. 3, c. 34, and 53 G. 3, c. 127, s. 6, in the same manner as if the same were herein set forth and re-enacted: Provided always, that nothing hereinbefore contained shall extend to any case in *which the actual title to any tithe, obligation, composition, modus, due, or demand, or the rate of such composition or modus, [*335 or the actual liability or exemption to or from any such tithe, oblation, composition, modus, due, or demand shall be bonâ fide in question, nor to any case in which any suit or other proceeding shall have been actually instituted before the passing of this act." And s. 2 enacts, "that, in case any suit or other proceeding has been prosecuted or commenced, or shall hereafter be prosecuted or commenced, in any of His Majesty's courts, for recovering any great or small tithes, modus or composition for tithes, rate, or other ecclesiastical demand, substracted, unpaid, or withheld by or *due from any Quaker*, no execution or decree or order shall issue or be made against the person or persons of the defendant or defendants, but the plaintiff or plaintiffs shall and may have his execution or decree against the goods or other property of the defendant or defendants," &c. If the magistrates had no jurisdiction, this court has none.

Then, as to the second rate of the 15th of July, 1858, which was made for common-law purposes. It is made upon the wrong area of rating: it should have been assessed upon the whole parish before the division in 1844,—it being made within twenty years of the severance, —unless it be within the operation of Lord Blandford's Act, 19 & 20 Vict. c. 104, s. 14.(*a*) One or other of the areas of rating must necessarily be wrong. By the division of the parish into districts, or at all events by operation of the 19 & 20 Vict. c. 104, the select vestry ceased to have any existence quoad the new districts: 59 G. 3. c. 134, s. 30; 3 G. 4, c. 72, s. 10. Those who were not resident within the curtailed parish had no right to belong to the select vestry of that parish.

*Neither rate appears to have been made by a majority of the [*336 vestry. The select vestry, it seems, consisted of twelve persons besides the rector and two churchwardens. A third person signs the first rate as a churchwarden, as to whom no explanation is given. In Blacket *v.* Blizard, 9 B. & C. 850 (E. C. L. R. vol. 17), 4 M. & R. 641, the commissioners for building and enlarging churches having, pursuant to the statutes 58 G. 3, c. 45, and 59 G. 3, c. 134, s. 30, appointed twenty-six persons to be a select vestry for the care and management

(*a*) Antè, p. 329: and see 6 & 7 Vict. c. 37, s. 18.

of a church and all matters relating thereto,—it was held, that, in order to constitute a good assembly of the select vestry so appointed, there must be present a majority of the number (viz. fourteen) named in the appointment; and therefore that a rate for the repair of the church made at a meeting where there was not such a majority was illegal, and that payment of such a rate could not be enforced in the ecclesiastical court. If a majority must attend the meeting, by parity of reasoning a majority must sign the rate. The rate here professes to be made by the majority; the memorandum so states.

Then, in the estimate for the common-law rate, there are two items, viz. "Visitation fees and expenses, 4*l.* 5*s.* 9*d.*," and "C. Bramwell, interest, 10*l.*," which, if chargeable at all, should have been charged upon the statutable rate. Further, there is a charge for "Copy of registers, 5*l.* 7*s.*" for the payment of which the law has made no provision; at all events, there is no authority for charging it upon the church-rate. The only legitimate fee for the visitation seems, by the 116th Canon (4 Burn, Eccl. Law, 32) to be 4*d.* in one year: and it seems that visitation fees are chargeable on the incumbent: Saunderson *v.* Clagget, 1 P. Wms. 657, 1 Stra. 421. The insertion of illegal or retrospective items vitiates the rate: Watkins *v.* Seaman, 2 *Lutw. 1019; Piggott *v.* Bearblock, 3 Notes of Ecclesiastical Cases 85, 4 Moore's P. C. 399.

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The same objections apply to the meetings at which the churchwardens were chosen as to the meetings at which the rates were made; individuals were present who seem to have had no right to be there.

Coleridge, contrà.—The appellant being a Quaker, the jurisdiction of the magistrates is not ousted. The 7 & 8 W. 3, c. 34, s. 4, which is not repealed, expressly provides that the magistrates shall have jurisdiction in the case of a Quaker refusing to pay tithes or church-rates. [Byles, J.—The 5 & 6 W. 4, c. 74, s. 1, somewhat qualifies it.] That only applies to proceedings in the superior courts. Here, the appellant is summoned under the 7 & 8 W. 3, c. 34. It must be taken that the magistrates have acted properly; and all that the court can do is to answer the question submitted to them by the magistrates. [Erle, C. J.—I feel a difficulty in answering a question which the magistrates have no right to put to us.] Here is a special provision preventing the application of the general law to a particular class of persons. Any general act which might afterwards be passed on the subject could only affect the general procedure, but will not affect the special provisions addressed to the class. Thus, in Williams *v.* Pritchard, 4 T. R. 2, it was held that houses built on lands embanked from the Thames in pursuance of the 7 G. 3, c. 37, which vested those lands in the owners free from taxes, were not liable to be assessed to the general land-tax imposed by the 27 G. 3, c. 5, though such act was conceived in general terms, and was subsequent in point of time to the act creating the exemption. And see Eddington *v.* Borman, 4 T. R. 4, and Perchard *v.* Heywood, 8 T. R. 468. [Williams, J.—The 7 & 8 W. 3, c. 34, is silent as to the prohibition to *the justices to go on where the validity of the rate is disputed. The 7th section of the 53 G. 3, c. 127, for the first time introduces the provision that the magistrates shall forbear to give judgment if they receive notice of such dispute. Then comes the 5 & 6 W. 4, c. 74, which compels the parties to go to the inferior juris-

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diction where the sum to be recovered is under 50*l.* The magistrates here have decided that a Quaker is not to be allowed to contest the validity of the rate otherwise than by appeal. BYLES, J.—You have said nothing to show that a Quaker, as to his goods, is not liable to the ecclesiastical jurisdiction. Tithes may be recovered against him in the ecclesiastical court.] If the demand be under 50*l.*, the Quaker can only be proceeded against for church-rate before the magistrates. [ERLE, C. J.—I incline to think that the jurisdiction of the magistrates is ousted as to Quakers as well as others, where the validity of the rate comes in question. As to that point, we will take time to consider. It will probably dispose of the case, and therefore we could not usefully hear you upon the other points. WILLIAMS, J., referred to the judgments of Bayley, J., and Holroyd, J., in The King *v.* The Churchwardens of Milnrow, 5 M. & Selw. 248.] *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court:—(*a*)

In this case church-rates had been made upon the appellant; and he, being a Quaker, had been summoned to appear before two justices, for non-payment, under the 7 & 8 W. 3, c. 34, s. 4, and had offered bonâ fide several serious objections to the validity of the rate.

*The magistrates were of opinion that the rates were valid on the face of them, and therefore made an order to pay, and declined to enter into the question of the invalidity of the rates by reason of the alleged illegal constitution of the vestry, and have stated the facts in evidence before them, and have sent to us a question under the 20 & 21 Vict. c. 43, s. 2, whether the appellant is liable to pay all or any of these rates. [*339

The respondents allege that the 7 & 8 W. 3, c. 34, gives jurisdiction to the justices, and creates the duty in them to make the order under these circumstances:—That statute recites that Quakers, by a pretended scruple of conscience, refuse to pay tithe and church-rates, and enacts that the two next justices may upon complaint of a refusal to pay examine the truth and justice of such complaint, and ascertain and state what is due and payable by such Quaker to the party complaining, and enforce payment. It then gives an appeal to the quarter sessions, and takes away the certiorari, unless the title of such tithes,—omitting church-rates,—shall be in question.

This act and some others which followed were temporary acts; but these provisions were made perpetual by the 1 G. 1, c. 6; and they were extended to other dues and payments of like nature with tithes and church-rates; and the clause taking away the certiorari unless the title to the tithes is in question, is materially altered, by leaving it in all cases where the title to such tithes, *dues*, or *payments* shall be in question.

The respondents' construction is said to be confirmed by the 53 G. 3, c. 127, s. 6, which extends the provisions of the last-mentioned statute to any value not exceeding 50*l.*, and makes no provision for taking away the jurisdiction of the justices in case there should be an objection to the validity of the church-rate; whereas, in s. 7, immediately following, and *giving jurisdiction to two justices over persons not Quakers up to 10*l.*, there is such a provision; and so the respondents contend that Quakers were intentionally left to the decision of the [*340

(*a*) The judges present at the argument were,—Erle, C. J., Williams, J., Byles, J., and Keating, J.

two justices, while the rest of the community were to have a recourse to a tribunal more conversant with ecclesiastical law.

On the other hand, it seems extremely improbable that the legislature should intend to deprive Quakers of any legal protection which other persons are entitled to.

Also the context of the first enactment giving power to the justices to examine the truth and justice of a complaint of a refusal on account of a pretended scruple of conscience, indicates an intention that the compulsion of the justices should be used to overcome the pretended scruple: but, if there should be a real objection to the validity of the rate, the justices would not act in accordance with truth and justice if they compelled payment of an invalid rate, without being able to decide the true liability of a party.

The statute declares the intention of the legislature to be so in respect of tithes, by leaving the certiorari to remove the proceedings when the title comes in question: the reason for this provision extends equally to rates and other dues.

The act 5 & 6 W. 4, c. 74, tends to support the appellants' view of the intention of the legislature. It enacts that no Quaker shall be sued for any tithe or ecclesiastical rate under 50*l.* in any court, but shall be subjected to the summary jurisdiction of two justices; and it further provides that nothing therein contained should extend to a case where the title to any tithe or the rate of any modus or composition should be bonâ fide in question.

This statute confines the summary jurisdiction over tithes to cases *341] where the title is not in question; and *there are expressions indicating the same intention, although imperfectly expressed, in case of church-rates.

The examination of the statutes does not lead to a clear decision upon the case now before us: but we find nothing in them to exclude the operation of the general rule, that the summary jurisdiction of justices ceases when a matter of title comes into question bonâ fide before them: and our decision is founded upon the application of that principle; and for so doing there is considerable authority.

In Rex *v.* Furnis, cited by Denison, J., in Rex *v.* Wakefield, Burr. 486, Pratt, C. J., declared his opinion, that, where the right was in question, such cases were not intended to be within the statute then before the court, giving the justices jurisdiction in respect of small tithes. In Re Wakefield, an order upon a Quaker for payment of dues other than tithes being of the same nature as church-rates, had been removed by certiorari, on the ground, among others, that the title was in question, and therefore the justices had no jurisdiction. The affidavits in answer showed that the title was not really in question, but was disputed by the Quaker upon a mere pretence. Lord Mansfield declared that the act was passed for the ease and benefit of Quakers, that the jurisdiction was given to the justices when the dues were withheld from obstinacy or a mere scruple, but not when the real right and title was in dispute. The court then decides that the title must be controverted bonâ fide before the jurisdiction is ousted; and, as that was not the case there, the certiorari was quashed, and the order of the justices for levying the rate was sent back to be executed. The court, therefore, by implication, declared, that, if there had been a real dis-

pute about the title to the dues, it would have been the duty of the justices to refuse to make an order, and to proceed no further.

*In the present case, when the validity of the rate was bonâ fide brought into question, we think that the justices should not have proceeded, and therefore the order against the appellant was improperly made. [*342

It follows that the question of title submitted to us on the facts here stated was not for the decision of the justices, and that we could not properly give any further judicial answer thereto.

Appeal allowed.

PARIS *v.* LEVY. *Nov.* 16.

A tradesman's advertisement or handbill is open to fair criticism and remark, like a book or a work of art.

THIS was an action for a libel. The first count of the declaration stated, that, before and at the time of the committing of the several grievances thereinafter mentioned, the plaintiff carried on the business of a marine-store dealer at Clapham, in the county of Surrey, and had always properly conducted such business, and until the committing of the said grievances by the defendant next thereinafter mentioned had never been suspected of having been guilty, and had never been accused of any dishonest or improper practices whatever; yet the defendant, well knowing the premises, but contriving and intending to injure the plaintiff in his said business, and to cause it to be suspected and believed that he had been and was guilty of great misconduct in the management of his said business, and of dishonest and improper practices, falsely and maliciously printed and published of the plaintiff, in a certain newspaper called The Daily Telegraph, the *following, that is to say,—"Guildhall. Encouraging servants to rob their masters. Alderman Humphery, at the close of the public business, drew our reporter's attention to the following extraordinary handbill, which he said had been extensively circulated in the neighbourhood of Clapham,—a system which he stigmatized as most pernicious in its effects, as offering great inducements to servants to rob their masters and mistresses. He mentioned the matter, in order that the publicity of such an insidious proceeding might put the masters on their guard against such practices. The handbill contains such a number of unheard-of perquisites, that we give it in extenso:—'No monopoly! J. E. Paris (thereby meaning the plaintiff), wholesale and retail rag-merchant, begs to inform the public, that, in consequence of another rise in the market, he is enabled to give the following high prices:—2½*d.* per lb. for kitchen-stuff, 4*d.* per lb. for dripping, ½*d.* per lb. for bones, 3*d.* per lb. for white cuttings, 2½*d.* per lb. for white rags, 1½*d.* to 2*d.* for dirty white rags, 3*d.* to 4*d.* per lb. for cloth cuttings, 1½*d.* per lb. for oil-cloth, ½*d.* to 1*d.* per lb. for mixed rags, 1*d.* per lb. for tailors' cuttings, 6*d.* per lb. for brass, 8*d.* to 9*d.* per lb. for copper, 7*d.* to 8*d.* per lb. for pewter, 1½*d.* per lb. for lead, 1½*d.* per lb. for zinc, 1*s.* per lb. for plated metals, 7*d.* to 9*d.* for horse-hair, 10*d.* to 1*s.* per lb. for wax and sperm candle ends, 3½*d.* per lb. for broken flint glass. The highest price given for wine, beer, soda-water, ginger-beer, and doctors' bottles. Hare and rabbit-skins bought. The highest price given to dealers in the trade. Ladies' and gentlemen's [*343

left-off wearing apparel and old boots and shoes bought to any amount. Tailors' and upholsterers' shops cleared. Any of the above articles sent for, if required, from any distance, at the shortest notice. False bottoms, cheeks, and backs for stoves, flat-irons, &c., at the lowest price.
*344] Please to observe *the name and address,—No. 3, Bromell's Passage, High Street, Clapham, near The Plough inn.'"

The second count stated that the defendant, well knowing the premises, but contriving and intending further to injure the plaintiff in his said business of a marine-store dealer, and to cause it to be suspected and believed that he had been and was guilty of great misconduct in the management of his said business, and of dishonest and improper practices as aforesaid, falsely and maliciously printed and published of the plaintiff in the said newspaper called the Daily Telegraph the words following, that is to say:—"As a general rule, cooks on their 'day out' dress well. They are mostly portly parties, given to wearing black silk stockings, gaily-flowered bonnets brave in ribbons, stout silk dresses, the best of kid gloves, and capacious reticules: of late years they have even thrown themselves into crinoline and deeply-fringed parasols; and it is not so easy on a September afternoon to distinguish between a holiday-making cook in a comfortable family and a dry-salter's widow or a pious retired tavern landlady with fat dividends to receive at the Bank every Plough Monday. Now, the wages of cooks are not too liberal. Gentlemen of the wealthier class dine far too frequently at their clubs. Ladies often undertake culinary economy on their own account; and professed cooks,—letting alone the unhandsome competition of French artistes,—are not so much in request. But, cooks, do you know how you may add a handsome percentage to your wages and appear finer than ever on your 'day out?' Housemaids, are you desirous of captivating that heroic and hirsute full private in the life-guards by the splendour of your apparel superadded to the good looks with which our kindly brother nature has endowed you? Footmen, kitchen-maids,
*345] boys in buttons, 'foolish fat scullions' *even, are you aware that the philosopher's stone awaits your acceptance? that the sands of Pactolus are eager for your tread? that you may sweep up gold-dust with far greater ease than your housewifely brooms chase tea-leaves over the carpet? that nuggets of inconceivable size and in perpetual plenty are to be had for the asking at that dirty little den of a shop round the corner? that all your fortunes may be made in five minutes? Servants, then, listen to the voice of wisdom. The alchemist is only too happy to serve you. Crœsus has placed his banker's book at your disposal. The golden mean is yours. To be wealthy needs neither a tedious apprenticeship nor the exercise of unusual abilities. The whole process of growing rich is as easy as lying. You have but to adopt free-trade principles, declare that you will submit to no monopoly, and put your trust in Providence, perquisites, and Mr. P. (thereby meaning the plaintiff). The universal benefactor the initial of whose name we append resides in the neighbourhood of Clapham; and, from his temple of benevolence and love for the race of domestic servants he disseminates a handbill, which has lately, and very properly, been brought under the attention of the reporters for the press at Guildhall police court by Alderman Humphery. Mr. P. (meaning thereby the plaintiff) informs the British public,—having, we suspect, a sharp eye to servants in particular,—that, in consequence of another rise in the market, he is

enabled to give the most unprecedented prices,—cash prices, be it well understood,—for kitchen-stuff, dripping, bones, white-cuttings, white rags (clean and dirty), cloth-cuttings, mixed rags, copper, pewter, zinc, plated metals, spoons (with or without crests not objected to, we presume), horse-hair (does this exclude crinoline?), lead, wax and sperm candle-ends, tallow, broken flint-glass, wine, beer, soda-water, ginger-beer, *and doctors' bottles, hare and rabbit-skins. The enumeration of these multifarious articles has nearly taken our breath away: but we are far from having exhausted the programme of Mr. P. (meaning thereby the plaintiff). This indefatigable 'picker up of unconsidered trifles' buys ladies' and gentlemen's left-off wearing apparel, and purchases old boots and shoes to any amount. He clears upholsterers' and tailors' shops, this cormorant of rags and bones! He will send for any of these articles, if required, from any distance, at the shortest notice; and he will supply 'false bottoms,'—for what? for trunks?—at the lowest price, together with cheeks, backs for stoves, and flat-irons. Mr. P. (meaning thereby the plaintiff) concludes by requesting the public to observe his name and address. We have on our part acceded to his request; which accounts for the prominence we accord Mr. P. (meaning thereby the plaintiff) on this instant Thursday. Now, there is certainly nothing essentially immoral in keeping the receptacle for rags, bones, and dripping commonly, we believe, denominated a 'Dolly-shop.' The occupation is not genteel; but it may, nevertheless, be conducted with honesty. There are several chimney-sweepers and dust-contractors in London who are men of wealth and substance. Handsome investments can be made in chemical works for deodorizing manure. The process is not pleasant to the olfactory nerves; but the returns are, we hear, remunerative. Fortunes have been made in the cats' meat trade: sewer-hunters and mudlarks sometimes find gold watches and silver spoons during their unsavoury labours. George the Fourth's Major Hanger kept a coal and potato shed in Tottenham Court Road. On the whole, we consider, that, to keep a 'Dolly-shop' honestly, is infinitely preferable to discounting bills at 60 per cent., getting up bubble companies, selling worthless daubs as genuine Titians or *Correggios, giving the 'tip' for the St. Leger, officiating as night porter at a gaming-house, loitering on a cab-stand, skittle-sharping, thimble-rigging, holding a plurality of benefices and paying one's curate an average salary of 70*l.* per annum, forming a musical phenomenon, or taking so many thousands of the people's money every year for not taking care of those falcons which Her most gracious Majesty does not possess. Mr. P. (meaning thereby the plaintiff) is, we doubt it not, the very honestest 'Dolly-shop' keeper in all Clapham, nay, in the universal world. His word is doubtless as well as his bond. He pays as he goes. He gives good weight. His motto is 'small profits and quick returns.' But, will Mr. P. (meaning thereby the plaintiff) allow us to put this simple question to him,—'Are not these unheard-of high prices, these clamorous demands for rags, bones, kitchen-stuff, plated metal, and old copper,—are not these clap-trap announcements that flare on the door-jambs of five hundred 'Dolly-shop' keepers such as he, a premium offered to dishonesty? a direct incentive to servants to rob their masters and mistresses? The high prices which the Clapham rag-merchant vaunts his ability to give, the ready money he is so [*346] [*347]

charmingly anxious to pay,—these read very much like invitations to servants, when their legitimate and allowed perquisites run short, to make perquisites for themselves. How many visits to Mr. P.'s (meaning thereby the plaintiff's) 'omnium gatherum' does it take for one to Wandsworth police court? Mr. P. (meaning thereby the plaintiff) may be a very upright man, and his business may be conducted in a perfectly legitimate manner; but it is the duty of all employers to warn their servants against the specious placards that throw out baits to the weak and ignorant, and tempt the most trustworthy to pilfering and malversa-
*348] tion. The servant may begin with a *surreptitious piece of fat or a few rags: she may end by rifling her mistress's wardrobe, and running away with her best moirè antique dresses. The foot-page may take an old buckle to the ragman, to begin with; and end by breaking open the plate-chest. The climax of Mr. P.'s (thereby meaning the plaintiff's) unprecedentedly high prices may be penal servitude:" By means of the committing of which said several grievances by the defendant as aforesaid, the plaintiff had been and was greatly injured in his said business of a marine-store dealer as aforesaid, and divers persons had on account of the committing of the said grievances by the defendant as aforesaid from thence hitherto suspected and believed, and still did suspect and believe the plaintiff to have been and to be a person guilty of the dishonest and improper practices and misconduct so as aforesaid charged upon and imputed to him by the defendant, and had, by reason of the committing of the said several grievances by the defendant as aforesaid, from thence hitherto wholly refused, and still did refuse, to deal or have any transaction with the plaintiff in his aforesaid trade and business, or otherwise, as they were before used and accustomed to have, and otherwise would have had; and the plaintiff had thereby lost and been deprived of divers great gains and profits which would otherwise have arisen and accrued to him in his said business, and had been and was otherwise much injured and damnified therein: Claim, 500*l.*

The defendant pleaded not guilty, whereupon issue was joined.

The cause was tried before Erle, C. J., at the sittings in Middlesex after last Trinity Term. The action was brought by the plaintiff, a marine-store dealer residing at Clapham, against the defendant, the registered proprietor of The Daily Telegraph, to recover damages for
*349] *the publication by the latter of two libellous articles in that paper on the 14th and 15th of September, 1859, respectively. These articles were as set out in the two counts of the declaration.

On the part of the plaintiff it was insisted, that both articles were libellous and wholly unjustifiable; that the remarks of Alderman Humphery with reference to the handbill set out in the first count were not privileged by reason of the place where they were uttered, there being no inquiry on the subject before him in his magisterial capacity, and consequently their repetition by the defendant was without excuse; and that the article which formed the subject of complaint in the second count, assuming a handbill to be subject to the same rule,—was not within the protection afforded by the law to fair and temperate criticism, but was calculated to expose the plaintiff to the scorn and contempt of the world, as one who held out temptations to servants and others to act dishonestly towards their masters and mistresses, by offering them

a ready means of disposing of their plunder: and the case of Lewis *v.* Levy, 27 Law J., Q. B. 282, was referred to.

On the other hand, it was submitted that the remarks of the alderman were no more than a justifiable caution to the public against the mischievous tendency of the handbill, and that the observations of the editor, which were complained of in the second count, did not exceed the sanctioned limits of fair criticism.

In leaving the case to the jury, his Lordship in substance said: It appears to me that I need do no more than refer you to the articles, and bring your minds to what the plaintiff relies on, and what he is bound to establish, viz., that the articles are defamatory and tend to bring him into ridicule and contempt. It is alleged that they impute to the plaintiff that he gave facilities *for dishonest servants to bring the [*350 fruits of their dishonesty to a profit, and that he holds out a temptation and encouragement to servants who are wavering on the dividing line to overstep it and become dishonest. If that were the true charge against the plaintiff, it would undoubtedly have a tendency to bring him into ridicule or contempt, or both: and I think you will be of opinion that the articles have that tendency. But then the plaintiff is not entitled to recover unless he establishes that the defendant was actuated by malice. The law, however, does not require the plaintiff to prove personal malice or ill-will in the defendant in the sense of private hatred; but he must show that the defamatory matter was published without the existence of any legal justification. There are many occasions well known to the law where the use of defamatory words is justified on the ground that malice is negatived. Thus, in the case of literary criticism, considerable license is allowed. Lord Ellenborough, in Tabart *v.* Tipper, 1 Campb. 350, says: "Liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel, which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality." If, therefore, you find your verdict for the defendant, it must be upon the principle so laid down. I have looked through the articles in both papers. The article with reference to Alderman Humphery has nothing added by the editor to the remarks of the magistrate; and, in the article of the 15th of September, in which the improper tendency of the handbill is pointed out, I can find no single word which is either directly or *by implica- [*351 tion disrespectful to the plaintiff as a private individual or as a member of society,—not a word going beyond the tendency of the handbill. Had the defendant said anything against the plaintiff with reference to his private life, or his mode of managing his business, I should have felt bound to say there was no pretence of justification. If the plaintiff puts forth a handbill, and draws the attention of the public to it, which in the opinion of the editor of a public journal is dangerous to honesty, and holds out temptations to domestic servants, in whom much confidence is necessarily reposed, to deviate from the paths of honesty, it may be that he may justify strong remarks, provided the jury are satisfied that they are well founded and called for by the occa-

sion. My experience in the administration of criminal justice shows me that the business of a marine-store dealer cannot be carried on without bringing its proprietor into close proximity with the dishonest part of the community, and therefore requires the exercise of great care and caution. Many who carry on that business have aided the police with most commendable zeal, and have been the means of bringing many dangerous criminals to justice. Others, on the other hand, have been found but too ready to afford facilities for the disposal of stolen property. If you consider that the handbill issued by the plaintiff has the dangerous and immoral tendency attributed to it by the defendant, then I think he has done that which may be salutary to the community. If that is your opinion, and you think he has not been influenced by malice against the plaintiff, but has acted solely from a desire to counteract the dangerous tendency of the plaintiff's publication, your verdict ought to be for the defendant.

The jury returned a verdict for the defendant.

*352] *Ribton*, on a former day in this term, obtained a rule nisi for a new trial on the ground of misdirection on the part of the Lord Chief Justice, "in not calling the attention of the jury to the first count, and in directing them that the law applicable to the criticism of a book applied equally to a handbill;" and also on the ground that the verdict was against evidence. There ought of necessity to have been a verdict for the plaintiff upon the first count; for, the observations of Alderman Humphery were altogether voluntary, unauthorized, extra-judicial, and clearly defamatory in their character, and wholly incapable of justification, and therefore the defendant could not justify their repetition: M'Gregor *v.* Thwaites, 3 B. & C. 24 (E. C. L. R. vol. 10), 4 D. & R. 695 (E. C. L. R. vol. 16); Lewis *v.* Levy, 27 Law J., Q. B. 282. The attention of the jury here was altogether withdrawn from the first count. [ERLE, C. J.—If my attention had been drawn to it, I should have told the jury it was for them to say whether *the whole* did not come within the definition of fair and reasonable criticism of the plaintiff's handbill.] There was no evidence to warrant the jury in finding that it was a fair comment on the handbill. [WILLIAMS, J.—Whether libel or no libel is for the jury, unless a question of privileged communication arises. The judge may if he will assist the jury by telling them his opinion of it; but he is not bound to do so: Baylis *v.* Lawrence, 11 Ad. & E. 920 (E. C. L. R. vol. 39), 3 P. & D. 526. That was a somewhat remarkable case. With respect to the first issue, on not guilty, Lord Abinger said to the jury,—"I own I find a difficulty in saying whether it is a libel or not. Gentlemen, can you assist me?" And he gave them no other direction as to that issue. Upon a motion for a new trial, on the ground of misdirection, Lord Denman said: "I have always followed the practice adopted in this case by Lord Abinger, leaving the jury to say

*353] whether, under *all the circumstances, the publication amounts to a libel. That practice is analogous to the enactments of the statute 32 G. 3, c. 60. The statute, indeed, is applicable only to criminal cases: but it was a declaratory act; and the importance of declaring the law existed only in the case of criminal libels. The act, therefore, furnishes clear evidence that the judge is not, in civil cases, bound to state his opinion whether the publication be libellous or not: and this agrees with the late decision of the Court of Exchequer in Parmiter *v.*

Coupland, 6 M. & W. 105."† And Littledale, J., said: "It was at one time thought that the jury had nothing to do with the question as to the nature of the publication, upon the trial of an indictment. Then the statute 32 G. 3, c. 60, was passed, declaring that the jury might find a general verdict upon the whole matter, with liberty to the judge to give his opinion at his discretion. Although that act applied more particularly to criminal cases, yet I know no distinction between the law in criminal cases and that in civil in this respect. Therefore, that which has been declared to be law in criminal cases is the law in civil cases: and the Lord Chief Baron was entitled to do as he did."]

A rule nisi having been granted,

Edwin James, Q. C., *Lush*, Q. C., and *Manley Smith*, showed cause. —There was no misdirection. The Lord Chief Justice took the law as laid down by Lord Ellenborough in Tabart *v.* Tipper, 1 Campb. 350: and in the course of his summing up he distinctly called the attention of the jury to both the articles complained of. [ERLE, C. J.—Nobody claimed more in respect of the one count than of the other.] The plaintiff, who carries on the business of a marine-store dealer, circulates a handbill of a very peculiar *description about his trade. Now, [*354 if a man, for the purpose of his trade,—whether he be a marine-store dealer, or a tailor, or the proprietor of a theatre or other place of public entertainment, puts forth a document of this sort, the public press is as much authorized to comment upon its mischievous and dangerous tendency as in the case of a book, a review, a statue, a picture, or any other work of science or art. In the case of a book, it will not be suggested that the direction of my Lord was wrong: and certainly one would think the rule applied à fortiori to a handbill. It appears that Alderman Humphery, who resides at Clapham, having obtained possession of one of these handbills, and seeing at once their evil tendency, took it with him to the Guildhall justice-room, and publicly called attention to it. The defendant does not seek to justify the statement there made by the alderman, on the ground that it occurred in a public court of justice; and therefore the doctrine laid down by the Court of Queen's Bench in Lewis *v.* Levy, 27 Law J., Q. B. 282, has no application. But, this document having become public property, the defendant, as proprietor of a public journal, was justified in making fair and temperate comments on it: and he has not transgressed the recognised limits. [BYLES, J.—The matter upon which the first count is founded is not a criticism by the editor: it purports to be a report or account of what was said by Alderman Humphery.] It is not the less privileged because the defendant adopts the criticism of another. [BYLES, J.—Has it ever been held that a verbal statement is entitled to the privilege?] Probably not: but, if a written comment be justifiable, à fortiori a verbal one must be.(*a*) Suppose, upon the *issuing of this handbill, the inhabitants of the district had held [*355 a meeting for the purpose of ascertaining the best mode of counteracting the pernicious tendency of its allurements, and the language here used had been embodied in a speech, would not a report of that speech have been justifiable, on the ground that it was a fair and

(*a*) Otherwise, a blind reviewer, or one who dictates his criticisms to an amanuensis, would be excluded from the protection afforded by this rule of law.

legitimate criticism of the publication? [KEATING, J.—You do not contend that a critic is justified in imputing personal or dishonest motives?] Certainly not. [KEATING, J.—Are there not many passages in the course of the editorial remarks which it is impossible to read without feeling that they convey very serious insinuations against the plaintiff?] No doubt many of them are strongly expressive of dissatisfaction at the plaintiff's conduct and motives in publishing such a document. But the language of criticism is not to be too rigidly scanned. Take the case of an indecent print or book: is a man bound to lay on his strictures upon the tendency of the production with a sparing hand? In the justly celebrated case of Carr *v.* Hood, 1 Campb. 354, n., Lord Ellenborough lays down the rule as to literary criticism in a manner which has never yet been impugned. "One writer," he says, "in exposing the follies and errors of another, may make use of ridicule, however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interest of the person ridiculed suffer, it is damnum absque injuriâ. Where is the liberty of the press, if an action can be maintained on such principles? Perhaps the plaintiff's Tour through Scotland is now unsaleable: but, is he to be indemnified by receiving a compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his compositions? Who would have bought the works of Sir Robert Filmer, after he *356] *had been refuted by Mr. Locke? But, shall it be said that he might have sustained an action for defamation against that great philosopher, who was labouring to enlighten and ameliorate mankind? We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous: otherwise, the first who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. Reflection on personal character is another thing. Show me an attack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him: but I cannot hear of malice on account of turning his works into ridicule." And he concluded by telling the jury, that, "if the writer of the publication complained of had not travelled out of the work he criticised, for the purpose of slander, the action would not lie; but, if they could discover in it anything personally slanderous against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action, and they would award him damages accordingly." [ERLE, C. J.—The language of the same learned judge in Tabart *v.* Tipper, antè, p. 350, is also very cogent.] In Soane *v.* Knight, M. & M. 74 (E. C. L. R. vol. 22), Lord Tenterden, in summing up, says: "This publication professes in substance to be a criticism on the architectural works of the plaintiff. On such works, as well as on literary productions, any man has a right to express his opinion, and, however mistaken in point of taste that opinion may be, or however unfavourable to the merits of the author or artist, the person entertaining it is not precluded by law from its fair, reasonable, and temperate expression. It may be fairly and *reasonably expressed, although *357] through the medium of ridicule." In Thompson *v.* Shackell, M. & M. 187 (E. C. L. R. vol. 22), where the proprietor of a newspaper

described a certain painting of the plaintiff, an artist, as a mere daub, and used other strong terms of censure, Best, C. J., in summing up to the jury, said: "The question for you is, whether the publication is a fair and temperate criticism on the painting of the plaintiff, or whether it be made the vehicle of personal malignity towards the plaintiff. I have myself (in Dunne *v.* Anderson, R. & M. 287 (E. C. L. R. vol. 21),) acted on the doctrine of my Lord Ellenborough in the case referred to (Carr *v.* Hood), though I do not go quite so far as he did in that case, because I think no personal ridicule of the author is justifiable; but, if this be really an *honest* criticism, and no more, this defendant is entitled to your verdict. If he has exceeded the limit of fair and honest criticism, then you will find for the plaintiff." That is in substance the manner in which the jury were directed in the present case. So, in Dibdin *v.* Swan, 1 Esp. N. P. C. 28, Lord Kenyon says,—"The editor of a public newspaper may fairly and candidly comment on any place or species of public entertainment; but it must be done fairly and without malice or view to injure or prejudice the proprietor in the eyes of the public.(*a*) If so done, however severe the censure, the justice of it screens the editor from legal animadversion; but, if it can be proved that the comment is unjust, is malevolent, or exceeding the bounds of fair opinion, such is a libel, and therefore actionable." And Lord Tenterden, in Macleod *v.* Wakley, 3 C. & P. 311 (E. C. L. R. vol. 14), says: "Whatever is *fair, and can be reasonably said of the works of authors, or of themselves as connected with their works, is not [*358 actionable, unless it appears, that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author; and then it will be a libel." And see Delany *v.* Jones, 4 Esp. N. P. C. 191. Here, the comments were fully justified. Every man knows that the first temptation to domestic dishonesty is inculcated by this sort of dealing. Suppose a handbill were published by a candidate at an election, saying that those electors who voted for him would not be forgotten,—would not a public journalist be justified in commenting upon it in the strongest of terms? What can be more insidious, more dangerous, and more fatal to society than the dissemination of such a document as this? And whose duty is it to criticise, to expose, and if necessary to stigmatize, any publication or any practice of trade which has a tendency to corrupt and to debase the public morals, if it be not that of the journalist? What would become of the boasted liberty of the press, if this be not conceded to it? The jury expressly negatived all personal imputation. [ERLE, C. J.—I told them, that, if there was a word which went beyond fair remark upon the contents and the effect of the handbill, or contained any attack upon the plaintiff in his private life, the publication would be unjustifiable.(*b*) I certainly said that I could find none such; but I left it to the jury to exercise their own judgment upon it.] The direction was strictly in accordance with the law which has prevailed ever since the time of Lord Ellenborough. And there is no pretence for saying that the verdict was against evidence.

(*a*) It is difficult to see what other object an editor can have in writing strictures upon a public entertainment, if it be not to "prejudice the proprietor in the eyes of the public," by inducing them to abstain from patronizing his exhibition.

(*b*) See Green *v.* Chapman, 5 Scott 340, 4 N. C. 92 (E. C. L. R. vol. 33).

[ERLE, C. J.—That part of the rule presents the same question in another form.]

*359] *Ribton* and *Lawrence*, in support of the rule.—The statement made by Alderman Humphery, being non-judicial, voluntary, and unauthorized, is clearly without the protection which the law has thrown around "fair and temperate criticism." In M'Gregor *v.* Thwaites, 3 B. & C. 24 (E. C. L. R. vol. 10), 4 D. & R. 695 (E. C. L. R. vol. 16), where the matter brought before the magistrate was not brought before him in his judicial character, or in the discharge of his magisterial functions, its publication could not be justified on the ground of its being a correct report of the proceedings. It is only where the publication consists of "a fair, correct, and impartial (though not verbatim) report of a trial in a court of justice," without any comment reflecting upon any of the parties whose names appear in it, that it is justifiable: Lewis *v.* Levy, 27 Law J., Q. B. 282. Lord Campbell there says: "As to magistrates, if, while occupying the bench from which magisterial business is usually administered, they, under pretence of 'giving advice,' publicly hear slanderous complaints over which they have no jurisdiction, although their names may be in the commission of the peace, a report of what passes before them is as little privileged as if they were illiterate mechanics assembled in an alehouse." What possible justification can there be for the heading of the article set out in the first count,—"Encouraging servants to rob their masters?" How can it be said that that does not convey a serious personal imputation upon the plaintiff? It is like the heading of the publication in Lewis *v.* Clement, 3 B. & Ald. 702 (E. C. L. R. vol. 5), "Shameful conduct of an attorney," which was held to deprive the defendant of the immunity he would otherwise have been entitled to. There is no analogy between a document of this sort and a book or a work of art. The author and the artist challenge and invite criticism. But this is a mere price-list. A bookseller's catalogue

*360] of necessity *must contain many books of an immoral or an irreligious tendency; yet no one could for a moment suggest that a newspaper editor would therefore be justified in writing of the person issuing it that he is an immoral or an irreligious man. The ground of justification in cases of this sort extends no further than in the case of privileged communications: see Somerville *v.* Hawkins, 10 C. B. 583 (E. C. L. R. vol. 70); Taylor *v.* Hawkins, 16 Q. B. 308 (E. C. L. R. vol. 71); Gilpin *v.* Fowler, 23 Law J., Exch. 152. In Tuson *v.* Evans, 12 Ad. & E. 733 (E. C. L. R. vol. 40), Lord Denman says: "Any one, in the transaction of business with another, has a right to use language bonâ fide, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious or painful to another: and this is the principle on which privileged communication rests: but defamatory comments on the *motives* or *conduct* of the party with whom he is dealing, do not fall within that rule." And in Harrison *v.* Bush, 5 Ellis & B. 344, 348 (E. C. L. R. vol. 85), Lord Campbell says: "During the argument, a legal canon was propounded for our guidance by the plaintiff's counsel; and this we are willing to adopt, as we think that it is supported by the principles and authorities upon which the doctrine of privileged communications rests. 'A communication made bonâ fide upon any subject-matter in which the party communicating has an *interest*, or in reference

to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contain criminatory matter which, without this privilege, would be slanderous and actionable.'" And further on he says: "'Duty,' in the proposed canon, cannot be confined to legal duties, which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation." What moral or social duty had this defendant to *malign and vilify the plaintiff? In Wilson *v.* Reed, 1 Fost. & Fin. 149, [*361 Hill, J., says: "Any publication which exposes an individual to hatred, contempt, or ridicule, being published without lawful excuse, is a libel."(*a*) In Gathercole *v.* Miall, 15 M. & W. 319,† a doubt is suggested by Parke, B., as to the right of comment or criticism on unpublished sermons. In Davison *v.* Duncan, 7 Ellis & B. 229 (E. C. L. R. vol. 90), Lord Campbell says: "A fair account of what takes place in a court of justice is privileged. The reason is, that the balance of public benefit from the publicity is great. It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of the injury to private character is infinitesimally small as compared to the convenience of publicity. But it has never yet been contended that such a privilege extends to a report of what takes place at all public meetings. Even if confined to a report of what was relevant to the object of the meeting, it would extend the privilege to an alarming extent. If this plea is good, a fair account of what takes place may be published, whatever harm the publication may do to private character, provided it take place at a meeting of a public nature,—a wide description, embracing all kinds of meetings, from a county meeting to a parish meeting. At such meetings things may well be said very relevant to the subject in hand, yet very calumnious. In what an unhappy situation the calumniated person would be if the calumny might be published and yet he could not bring an action and challenge the publishers to *prove its truth!" Assuming that the handbill was properly [*362 the subject of comment,—what is there in it to warrant the defendant in holding the plaintiff out as a thief,—a "picker up of unconsidered trifles," or as one who incites others to commit felony?

BYLES, J.(*b*)—I am of opinion that this rule should be discharged. I can see no distinction between a handbill or a circular or advertisement which is published to all the world, and a book: both are literary productions, and are addressed to the public, and both are subject to the same comment and criticism. The shape in which they are published makes no difference: many advertisements, indeed, are issued in the form of books. Two-thirds of the daily newspapers are usually taken up with advertisements of various sorts. It is plain, therefore, that the form in which the publication appears can make no difference. The rule is clear, that, although what is said might under other circumstances fall within the general definition of a libel, as a publication calculated to bring another into ridicule or hold him up to contempt, yet, where the comments do not exceed the bounds of fair and reasonable criticism, the law

(*a*) The learned judge also says: "There is, indeed, a rule which I may state to the jury, that it is allowable to discuss matters of public interest in the columns of the newspapers, but it must be done bonâ fide and without malice, or anything beyond what is necessary for public discussion."

(*b*) Williams, J., was engaged in the Divorce Court.

allows the privilege. There are numerous authorities showing and enforcing the rule where the criticism is in writing: but, though I asked in the course of the argument if there was any case in which that rule had been extended to oral criticism, none has been cited: but I agree with Mr. *James* that that is a far stronger case for privilege than the other. It would manifestly be absurd to hold that a written criticism is justifiable, but that the same remarks made orally would be destitute of that privilege. That being so, it seems to follow that this handbill was the
*363] *legitimate subject of fair comment, whether oral or otherwise. It is conceded that the remarks made by Alderman Humphery were not privileged because uttered in a court of justice: and they stand, therefore, precisely upon the same footing as if the alderman had addressed them to any private individual. It seems to me that the comments so made by him were privileged, provided the jury were of opinion that they did not exceed the line of fair and reasonable criticism on the publication put forth by the plaintiff, and did not reflect upon his private character: and the same rule applies to the article in the newspaper. The real question was,—did the remarks exceed the fair license of criticism, and degenerate into reflections upon the private character of the plaintiff? It seems to me that the question is precisely the same upon both counts of the declaration. Mr. *Ribton*, on moving for the rule, complained that my Lord in his summing up did not draw the attention of the jury to the distinction between the two counts, but gave them the same direction as to both. But it appears from the report of the trial in 2 Fost. & F. N. P. 74, that the Lord Chief Justice, with reference to the second count, told the jury that, if the defendant had said one word against the plaintiff with reference to his private life or his mode of managing his business, there would be no excuse for the publication; but that, if the plaintiff put forth a handbill which in the opinion of the editor was most dangerous to honesty, and held out a temptation to servants to depart from their duty, it might be the editor would be able to excuse before a jury the remarks he had made, if in their judgment they were well founded and wholly applicable to it. That seems to me to have been a correct direction as to the second count; and I think it is equally correct if applied to the first count. There is, therefore, as
*364] far as I can see, *no objection whatever to the way in which the case was left to the jury. They were told, that, although primâ facie libellous, the observations made upon the handbill, whether made by Alderman Humphery or by the defendant, were justifiable or not as they did or did not transgress the limits I have already pointed out. Then, as to the verdict being against evidence. Actions for libel stand on a peculiar footing. The statute 32 G. 3, c. 60, which is declaratory of the law, says that the judge may,—which has sometimes been construed *shall*,—give his opinion; but that, whether the publication is libellous or not, is a question for the jury. The rule is the same in civil as in criminal cases. Here, the Lord Chief Justice did give his opinion; and he left the true question for the jury. It is not necessary for me to say whether or not I should have come to the same conclusion that the jury did: but we cannot withdraw from them that which was the legitimate subject for their determination. Besides, I cannot help thinking that Alderman Humphery's comments upon the publication were apt and laudable; and I incline to say as much of the article in the

newspaper, which forms the subject of the second count. Even if a jury could be induced to find a verdict for the plaintiff in such a case, no jury would give more than nominal damages. To refuse to send the cause down again, therefore, will be mercy to the plaintiff.

KEATING, J.—I also am of opinion that this rule should be discharged. The declaration complains in two separate counts of two publications injuriously reflecting upon his character,—the one consisting of a report of certain unauthorized statements made by Alderman Humphery which were not justified by the occasion,—the other, of an article written by the editor of the newspaper. Now, much of Mr. *Ribton's* argument has been directed to establish that which *was not contested by [*365
the counsel for the defendant, viz. that the occasion on which Alderman Humphery made the statements contained in the first count would not have protected them, any more than if they had been made at any other place than the justice-room, Guildhall. But the defendant insists that he had a right to print those statements in his newspaper, and to add observations of his own, and that, if those statements and observations contained only fair criticism on the plaintiff's publication, they are privileged. It is conceded, that, whilst the editor or proprietor of a newspaper is justified in commenting, nay, in the discharge of his public duty may be obliged to comment, fairly and impartially on any publication or passing event,—and I see no distinction in this respect between a publication in the shape of a handbill and any other description of publication,—yet, in making such comments, he must take care that they do not degenerate into imputations of personal motives or reflect upon the private character of another. During a considerable portion of the argument, I was under the impression that the question left by my Lord to the jury was, whether the articles complained of were a fair comment on the handbill, without drawing their attention to the limit of the rule, viz. that the comment must not involve an attack upon private character. That, however, was afterwards set right. There is no doubt that his Lordship did in distinct terms tell the jury, that, although a fair comment, it would not be privileged if it reflected on the private character of the plaintiff. That was a perfectly correct direction; and I am not aware of any other mode which would have been more correct. I think my Lord was perfectly right in telling the jury that there was no distinction as to fair comment and criticism between a handbill and a book or any other publication; as also in telling *them that if they thought that the language of the alleged libels [*366
was that of fair criticism, and free from personal imputation, the defendant was entitled to their verdict. As to the evidence,—no doubt many passages in the articles do go very near to impute personal and improper motives to the plaintiff; and it is not necessary for me to say what view I should have taken if I had been upon the jury. But it was peculiarly a question for the jury, and it was properly left to them; and, it being the undoubted privilege of the jury to say whether the publication was libellous or not, and they having found that it was not libellous in the sense of containing personal imputations such as would deprive it of the character of fair criticism, I do not think it is competent to us, even if satisfied that it did contain personal imputations, by granting a new trial as for a verdict against evidence, to take the case out of the hands of the jury, and thus deprive them of the privilege

which the legislature has declared that they and they only ought to enjoy,—if not by the express terms of the act, by the spirit of it, as construed by many decisions. The case having been properly left to the jury, and they having decided that the comments were fair and free from personal imputation, I think we could not grant a rule for a new trial as for a verdict against evidence, even if our impression were stronger than it is to the contrary. I also entirely agree with my Brother Byles that the heading of the handbill was most mischievous and calculated to lead to most injurious results. Upon the whole, I am of opinion that the rule should be discharged.

ERLE, C. J.—I have scarcely anything to add to what has fallen from my two learned Brothers, except to say that I entirely concur in the opinions they have expressed. The plaintiff addressed a handbill to the public *for the purpose of promoting his own interest; and it was thought by the jury to have a tendency to encourage servants to rob their masters. The defendant in his newspaper made observations reaching to that effect. His remarks, as well as those of Alderman Humphery, were confined to the tendency of the handbill, and warning masters of the evils which might be expected to result from it. The question of law before us, is, whether the privilege of fair criticism and remark upon literary productions extends to criticism and remark upon such a thing as this. There can, I think, be no doubt that in principle it does. I therefore fully concur in the judgment of the court, and think there is no ground whatever for finding fault with the verdict. Rule discharged.

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Honest though erroneous criticism upon the merits of a book, is not by itself libellous. But where facts are misstated, or the criticism is made the vehicle of personal abuse, it may become such: Fry *v.* Bennett, 3 Bosworth N. Y. 245; Cooper *v.* Slade, 24 Wendell 440. These doctrines were applied in Fry *v.* Bennett, *ut supr.*, to newspaper criticisms on the management of an opera.

GLEDDON *v.* TREBBLE. *Nov.* 17.

An action having been brought by the wife of a lunatic (not so declared by commission) in his name, for the recovery of a debt, the defendant paid the money into court:—The court made absolute a rule for payment of the money out to the wife.

A rule which does not ask for costs cannot be made absolute with costs.

THE plaintiff in this case was confined in Bethlem Hospital as a lunatic, and totally incapable of attending to his affairs. He had not, however, been declared lunatic under a commission. The action was brought in his name by his wife, to recover a sum of 382*l.* 18*s.* 8*d.*, which had been remitted from India for her use. The defendant having paid the money into court,—

Bovill, Q. C., on a former day in this term, on behalf of the wife, obtained a rule calling upon the defendant to show cause why the money should not be paid out to her. He referred to Rock *v.* Slade, 7 Dowl. P. C. 22, where it was held that the wife of a lunatic who has no com-

mittee has a sufficient implied authority to sue in the name of a lunatic for debts due to him.

Brett showed cause.—The action is founded upon a supposed implied authority in the wife to bring it in the name of her husband, he being lunatic. [*368 [BYLES, J.—There certainly is a difficulty. The plaintiff or his lawful attorney is the proper person to receive the money. What authority can the wife produce?] None. Suppose the plaintiff should recover, and should then repudiate the authority of the wife or the attorney to receive this money, what will be the plaintiff's position? The defendant has no desire to interpose any difficulty: he is willing, and always has been, to pay over the money on being indemnified. And, at all events, if the court should think this rule should be made absolute, it is submitted that the defendant should not be made to pay the costs of this motion. In Rock *v.* Slade, the court expressly guards itself from saying that the order of the court would afford any protection to the defendant in the case supposed.

Bovill, Q. C., in support of the rule.—There can be no doubt that the wife had a sufficient authority under the circumstances to bring the action. In the case referred to, Lord Abinger says: "It is every day's practice to sue in the name of a lunatic, and I never heard any question as to the propriety of such an action where no committee was appointed. If we were to compel a party to go into equity for the appointment of a committee, there are many instances in which a lunatic might starve before he could recover his money. If the defendant wants the protection of this court, he should let the plaintiff obtain judgment. *It seems to me that the rule of this court would be sufficient protection*, though I do not give any positive opinion on this point." If the defendant thought the action was brought without sufficient authority, he might have come and asked the court to stay the *proceedings. He has not thought fit to adopt that obvious course: and, by paying money into court in the cause, he admits that the action is properly brought, and cannot afterwards be heard to deny it. [*369 [ERLE, C. J.—I feel no difficulty as to making the rule absolute for the payment out of the money; but I think it should be without costs.] As the defendant has thought fit to come and oppose the rule, he ought to pay costs. [BYLES, J.—The master informs me that the rule does not ask for costs. ERLE, C. J.—If you get your rule made absolute in its terms, what more can you want?] The rule was advisedly drawn in its present shape, it being thought that the defendant would feel compelled to appear and show cause if called upon to pay the costs of the motion; whereas, the rule being drawn up without costs, he need not have come. The court has undoubted jurisdiction over the costs in every case. [ERLE, C. J.—I do not remember any case of a rule being made absolute with costs, where it did not ask for costs.(*a*) You are not hurt by the defendant's appearance; for, you must in any event have been instructed to come to make your rule absolute. KEATING, J.—You will retire with the satisfaction of reflecting that you have for once asked too little.] Rule absolute in its terms.

(*a*) In Gray on Costs, p. 481, it is said: "Where a rule does not ask for costs, no costs can be given on making it absolute; for, it is the clear and settled practice of the courts not to give more than is asked for; and this applies to cases where, if costs had been asked for, they would have been granted according to the general practice of the courts:" and for this the learned author cites The King *v.* The Sheriff of Middlesex, 2 Dowl. P. C. 5, 1 C. & M. 482,† 3 Tyrwh. 440.

*370] *ST. LOSKY and Others v. GREEN and Another.
Nov. 7.

Where an amendment at the trial merely consists in the correction of a blunder in the statement of the contract, and does not vary the real question the parties came to try, the judge is warranted in allowing it without imposing any condition.

A count stated that the defendants contracted to sell to the plaintiffs a cargo of "Merthyr coal *of the description called through and through*, to be hand-picked." This description being proved at the trial to be inconsistent and unintelligible, and the real contest being whether or not the contract was for "hand-picked coal," the judge amended by striking out the words in italics, the costs of the amendment being defendants' costs in the cause. The jury having found for the plaintiffs,—Held, that the amendment was properly made.

THIS was an action for the breach of a contract for the supply of a cargo of coals.

The first count of the declaration stated, that, by an agreement made between the plaintiffs and the defendants, the defendants agreed to sell to the plaintiffs, and the plaintiffs agreed to buy of the defendants, certain goods upon certain terms then agreed upon between the plaintiffs and the defendants, to wit, 1000 tons of Thomas's Merthyr coal of the description called through and through, to be hand-picked, at a certain price, to wit, 8*s*. 9*d*. per ton, delivered free on board the ship Sarah Park at Cardiff: General averment of performance by the plaintiffs: Breach, that the defendants did not nor would deliver to the plaintiffs on board the said ship, in manner provided for by the said agreement, coal of the quality, condition, and description in the said agreement mentioned, but on the contrary thereof, delivered on board the said ship coal of a much inferior quality, condition, and description, &c.

There was a second count upon a similar contract for a cargo of "Carr's Merthyr steam coal;" but this was abandoned at the trial.

The defendants pleaded, first, that they did not agree as alleged: secondly, to the first count, that, after the making of the contract in that count alleged, it was mutually agreed by and between the plaintiffs and the defendants that a different description of coal, to wit, "Carr's Merthyr steam coal," should be substituted for the coal in the first count
*371] mentioned, and that such *substituted contract was duly performed by the defendants. Issue thereon.

At the trial before Erle, C. J., at the sittings in London after last Trinity Term, the plaintiff St. Losky stated that Mr. Compton, one of the defendants, called upon him and contracted to sell him 1000 tons of Thomas's Merthyr coal, through and through, at 8*s*. 6*d*. per ton, to be delivered free on board the ship Sarah Park at Cardiff, for San Francisco: but that Compton shortly afterwards called on him again, and told him he could not supply Thomas's Merthyr coal, and thereupon it was agreed that Carr's Merthyr coal should be supplied instead, at 8*s*. 9*d*. per ton, to be hand-picked; that, in the bill of lading under which the coals were shipped, they were described simply as "Carr's Merthyr coal;" and that he remonstrated with the defendants, but the ship had already sailed.

A clerk of the plaintiffs, who was called, substantially confirmed the statement made by St. Losky.

It was proved that "through and through" meant at Cardiff screened

coal small and large; and that "hand-picked" meant the larger coals picked out by hand after they had been screened.

Several witnesses were examined upon interrogatories and cross-interrogatories at San Francisco for the purpose of proving the state of the cargo upon its arrival there, viz., that it contained a very large proportion of dust, and also to prove the prices realized on the sale of the coal. Their answers thereto were put in and read. From these, it appeared that the cargo was found to contain about 140 tons of small coal and dust, which produced almost nothing, and that the remainder of the cargo sold at the rate of 12½ dollars per ton.

At the close of the plaintiffs' case, it was submitted on the part of the defendants, that the evidence failed *to establish the contract [*372 stated in the first count, viz. a contract for "1000 tons of Thomas's Merthyr coal of the description called through and through, to be hand-picked,"—the evidence showing that the original contract was for Thomas's Merthyr coal through and through, and that the substituted contract was for Carr's Merthyr coal, to be hand-picked. They also proved that the average quantity of dust in good coal was about 18 per cent.

The plaintiffs' counsel thereupon prayed leave to amend by making the allegation accord with the proof. It was objected on the part of the defendants, that this would be substituting an entirely new contract; and he insisted, that, at all events, the defendants were entitled to costs as upon a nonsuit. The Lord Chief Justice, however, was of opinion that the real contest between the parties was whether the contract was for a cargo of Merthyr coal hand-picked and whether the coal shipped answered that description; and he proposed to amend the declaration accordingly, reserving the question of costs. The plaintiffs' counsel, however, standing upon what he conceived to be his rights, declined to consent to this; whereupon his Lordship ordered the amendment to be made, the costs of the amendment to be defendants' costs in the cause.

Witnesses were then called for the defendants, who stated that the substituted agreement was for a cargo of Carr's Merthyr coal, that that description of coal was shipped, and that there was no agreement that it should be hand-picked.

The jury returned a verdict for the plaintiff for 102*l.* 1*s.* 8*d.*, being the difference between the price realized by the 140 tons of small coal and dust and the price it would have fetched if it had all been hand-picked, according to the contract.

Montague Chambers, Q. C., now moved for a new *trial, on [*373 the ground that the evidence did not show any damage sustained by the plaintiffs, and also on the ground that the amendment was improperly allowed, or, at all events, should only have been allowed on the terms of the plaintiffs' paying costs as upon a nonsuit, inasmuch as the amendment presented an entirely new issue. [ERLE, C. J.—I thought, as the evidence showed that the contract as stated in the first count was inconsistent, the real contest between the parties was whether the coal was to be hand-picked or not. I therefore amended according to what I conceived to be the substance of the matter. I did not know how the amendment would affect the costs. I therefore proposed to reserve the question of costs. This course not being assented to by the defendants' counsel, I determined to make the amendment, and directed that the costs of the amendment should be defendants' costs in the cause. BYLES,

J.—What are costs of amendment? Would they include the costs of the commission?] The master would determine that. Then, notwithstanding the amendment, there was no evidence to warrant the finding of the jury. Nor did it appear that the plaintiffs had sustained any damage.

WILLIAMS, J.—I am of opinion that there should be no rule. It appears that in the course of the trial it became evident that the real contest between the parties was,—first, whether the contract was for "hand-picked" coal,—secondly, whether, assuming that the contract was for "hand-picked" coal, it has been performed by the delivery on board the Sarah Park of coal of that description. Not only was it apparent that this was the controversy, but it was clear that the pleadings did not fit that controversy; the declaration containing a description of the subject-matter of the contract which upon the evidence was inconsistent and *contradictory in its terms, and evidently framed in mistake. It was, therefore, clearly the duty of the judge to amend the pleadings so as to make them suitable to the question in contest between the parties. That being so, the only point remaining, is, whether the amendment ought to have been made upon the terms of the plaintiffs' paying costs. I think not. The defendants must, upon the finding of the jury, be taken to have contracted to ship a cargo of "hand-picked" coal, and to have failed in the performance of that contract. They knew what was the real matter in dispute; and, being aware that the plaintiffs had made a blunder in describing the contract in their declaration, they sought to take advantage of that blunder to defeat their claim. Under those circumstances, I think the plaintiffs were not entitled to any costs of amendment. Buckland *v.* Johnson, 15 C. B. 145 (E. C. L. R. vol. 80), was decided by this court upon the principle which ought to govern this case. There, to a count for money had and received, the defendant pleaded, that the "said debt for money received became due from, and was contracted by, the defendant jointly with A., and not by the defendant alone, nor by the two jointly and severally, but only jointly;" that, after the accruing of the causes of action in the count mentioned, the plaintiff sued A. for money had and received and in trover, and recovered a judgment against him for 100*l.* and costs; and that the causes of action in respect of which the plaintiff so recovered that judgment against A. *included all the causes of action to which that plea was pleaded.* It appeared in evidence, that the defendant and A. had wrongfully converted the goods of the plaintiff, by selling them; that the proceeds of the sale (150*l.*) were received *by the defendant alone;* and that the plaintiff had sued A., and recovered a verdict for 100*l.*, as the value of the goods so converted; but that, in consequence of *A.'s insolvency, he had obtained no satisfaction. Upon its being objected at the trial of the action, that the facts did not sustain the plea, the judge allowed the defendant to amend by substituting for the words above in inverted commas, the following, "the said money was money received for and as being the proceeds of the sale of the goods in the last count and hereinafter mentioned." It was held that the amendment was properly allowed, though the judge imposed no terms on the defendant. That, I think, is the true principle. The utmost the defendants could look for in this case, was, that the costs of the amendment should be their costs of the cause. That is

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what the Lord Chief Justice intended to decide; and the defendants having failed, it comes to the same thing. I therefore think there is no ground for finding fault with what was done at that stage of the proceedings. As to the rest, we understand from my Lord that he sees no reason to be dissatisfied with the conclusion the jury came to, or to suppose that any injustice has been done. The application therefore must fail.

BYLES, J.—I am of the same opinion. Not only do I think that my Lord did right in making the amendment, but that he was bound to make it. Originally, as well as after the amendment was made, the main question was, whether the coal which was the subject of the contract was to be hand-picked. That was the matter in controversy between the parties. That being so, the language of the 222d section of the Common Law Procedure, 1852 (15 & 16 Vict. c. 76), as it seems to me, left the learned judge no discretion. The statute enacts that "it shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceeding in civil cases, *whether there [*376 is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made." Various statutes have from time to time for more than 500 years been passed, from the 14 E. 3, c. 6, downwards, to facilitate amendments, but the strict and almost perverse construction which the judges put upon them rendered them nearly abortive. But now a totally different principle prevails. Every amendment is to be made which is necessary for determining the real question in controversy between the parties. If the real question in controversy was not touched by the amendment, I think it might properly be made without costs. The Lord Chief Justice intended that the costs of the amendment should be defendants' costs in the cause. In the result that came to the same thing. As to the damages, I collect that the jury gave the plaintiffs by way of damages the difference between the price for which the 140 tons of small coal and dust would have fetched if it had been in accordance with the contract, and the price for which it actually sold. I see no reason to find fault with that.

KEATING, J.—I also think the amendment in question was properly made, and the terms proposed just. As to the rest, I see no reason for complaint.

ERLE, C. J.—As to the amount of the damages, I cannot say that I was dissatisfied with the conclusion that the jury came to. I do not call to mind what the *contest was; but I find from Mr. *Lush's* [*377 summing-up, which I have before me, that he did not claim for the plaintiffs damages upon any principle which the law did not warrant. He claimed the precise amount which the jury, and as I think rightly, awarded to the plaintiffs. Rule refused.

TODD v. FLIGHT. *Nov.* 20.

An action lies against the owner of premises who lets them to a tenant in a ruinous and dangerous condition, and who causes or permits them so to remain until by reason of the want of reparation they fall upon and injure the house of an adjoining owner.

THE first count of the declaration stated, that, before and at the time of the committing of the grievances thereinafter mentioned, a certain chapel and building situate, &c., were in the possession of certain persons, to wit, Francis Cuthbertson, John Henry Adams, and Walter Arthur King, as tenants thereof to the plaintiff, the reversion of and in the same then and still belonging to the plaintiff; that, before the happening of the injuries to the said chapel and building and to the plaintiff as thereinafter next mentioned, the defendant was owner and possessed of a certain building, and a stack of chimneys, parcel of the same, near to the said chapel and building of the plaintiff; that the said chimneys then and from thence continually until and at the time of the happening of those injuries, were in a dilapidated, decayed, ruinous, insecure, and improper state, and in danger of falling, and likely to fall upon and do damage and injury to the said chapel and building of the plaintiff; and that the defendant, well knowing the premises, demised and let his said building, with the said chimneys in the said state, to another person, to wit, one Benjamin Batt, and wrongfully suffered and
*378] permitted the said chimneys to be and continue, *and kept and maintained, and continued kept and maintained the same in the said state until the same afterwards fell and came upon and against and through the roof and other parts of the said chapel and building of the plaintiff, and greatly broke, damaged, injured, and destroyed the same; and by means of the premises the plaintiff had been and was injured in his reversionary estate and interest of and in the said chapel and building.

Demurrer and joinder.

Honyman, in support of the demurrer.—The injury complained of in this declaration occurred whilst the premises adjoining were in the occupation of a tenant; there is, therefore, no ground on principle or upon authority to charge the present defendant. In Cheetham *v.* Hampson, 4 T. R. 318, it was held that an action on the case for not repairing fences, whereby another party is damnified, can only be maintained against the occupier, and not against the owner of the fee, who is not in possession. Lord Kenyon there says: "It is clear that this action cannot be supported against the owner of the inheritance, when it is in the possession of another person. It is so notoriously the duty of the actual occupier to repair the fences, and so little the duty of the landlord, that, without any agreement to that effect, the landlord may maintain an action against his tenant for not so doing, upon the ground of the injury done to the inheritance; and deplorable indeed would be the situation of landlords, if they were liable to be harassed with actions for the culpable neglect of their tenants." And Buller, J., said: "With respect to the case of Rosewell *v.* Prior, 2 Salk. 460, 1 Lord Raym. 713, 12 Mod. 635,(*a*) which is the only one cited of an action of a similar nature maintained against the owner out of possession, it is very

(*a*) See the pleadings, Lill. Ent. 82.

*distinguishable from the present: for, there, the owner let the premises with the nuisance complained of, which had been before erected upon them. That, therefore, was a misfeazance of which he himself had been guilty; and, say the court, his demise affirmed the continuance of the nuisance, and therefore might be said to be a continuation of it by himself." In Russell *v.* Shenton, 3 Q. B. 449 (E. C. L. R. vol. 43), 2 Gale & D. 573, it was held that a declaration in case for omitting to cleanse and repair drains and sewers, whereby the plaintiff's adjacent premises suffered damage, is bad on demurrer if it charge the defendant as the "owner and proprietor" of such drains and sewers, unless it also allege some ground of liability. These cases establish the rule that the occupier, and the occupier alone, is primâ facie liable. The main reliance on the part of the plaintiff will, no doubt, be placed upon Rosewell *v.* Prior and The King *v.* Pedly, 1 Ad. & E. 822 (E. C. L. R. vol. 28), 3 N. & M. 627 (E. C. L. R. vol. 28). But the ground upon which the defendant was held liable in the former was, that he transferred the premises "with the original wrong, and his demise affirms the continuance of it. He hath also rent as a consideration for the continuance, and therefore ought to answer the damage it occasions." There was an existing nuisance there at the time of the demise, which gave the plaintiff a cause of action; and the defendant authorized its continuance. Here, there is no averment that the defendant was under any obligation to repair; and, when he demised the premises to Batt, nothing had occurred to give the plaintiff a cause of action. [BYLES, J.—Rosewell *v.* Prior was a case of actual malfeazance.] So, in the case of the King *v.* Pedly, the owner of the land erected a building of which the occupation was likely to produce a nuisance, and let the land with the building thereon: that, therefore, may also be said to be a case of actual *malfeazance. Cresswell, J., in delivering the judgment of the court in Rich *v.* Basterfield, 4 C. B. 783, 805 (E. C. L. R. vol. 56), says: "If The King *v.* Pedly is to be considered as a case in which the defendant was held liable because he had demised the buildings when the nuisance existed, or because he had re-let them after the user of the buildings had created a nuisance, or because he had undertaken the cleansing and had not performed it,—we think the judgment right, and that it does not militate against our present decision. But, if it is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance, by the manner in which he uses the premises demised, we think it goes beyond the principle to be found in any previously decided cases; and we cannot assent to it." [KEATING, J.—In Rich *v.* Basterfield, the tenant might have used the premises without creating a nuisance. Here, the damage to the plaintiff arises without any act whatever on the part of the tenant.] To render the defendant liable, the plaintiff is bound to show some wrongful act on his part at the time of the demise. [ERLE, C. J.—The wrongful act alleged here, is, allowing the stack of chimneys to be impending over the plaintiff's premises, and letting his premises with the chimneys in that dangerous state. In Co. Litt. 56 b., it is said, that, "if a man hath a house near to my house, and he suffereth his house to be so ruinous as it is like to fall upon my house, I may have a writ de domo reparandâ, and compel him to repair his house." The

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writ,(a) which is given in Fitz. N. B. 127, is as follows,—"Command A. that, &c., he cause to be repaired his certain house in N. which threatens destruction, to the nuisance of the freehold of B. in the same town, which he ought and hath been used to repair, as it is said, &c., and unless, &c." In Chauntler v. Robinson, 4 Exch. 163,† the declaration stated that a *381] *certain messuage was in the occupation of S. as tenant to the plaintiff, the reversion thereof belonging to the plaintiff, that the defendant was the owner and proprietor of another messuage adjoining, and, by reason thereof, as such owner and proprietor, ought to have repaired and kept repaired in a substantial manner the messuage secondly mentioned,—breach, non-repair: and it was held that the declaration was bad, inasmuch as there is no obligation towards a neighbour cast by law on the owner of a house, merely as such, to keep it repaired in a substantial manner, his only duty being to prevent it from being a nuisance. Parke, B., in giving judgment, there says: "The defendant's counsel justly relied upon the case of Russell v. Shenton, in which most of the previous authorities were fully considered; and it was held that the duty of cleansing and repairing drains, and preventing them from being a nuisance to neighbours, is primâ facie that of the occupier; that the terms 'owner and proprietor' do not imply actual occupation; and that, if the owner and proprietor of drains, as distinguished from the occupier, is charged with neglect to cleanse, and consequent injury to the plaintiff, some special ground of liability ought to be stated in the declaration. That case cannot, we think, be distinguished from the present, and is an authority equally applicable to a nuisance from a ruinous house, as one from uncleansed drains. The case of Regina v. Watts, 1 Salk. 357, had previously decided, that, where there is a public nuisance caused by a ruinous house, the occupier was charged to the public, that the continuance of the house in that condition was a continuing of the nuisance; and, as the danger was the matter which concerned the public, the public were to look to the occupier, not the estate. Precisely the same reason applies to the case of a private nuisance by a *382] ruinous house. It does *not follow that the owner of the estate, as distinguished from the occupier, may not be made liable, but not simply because he is owner." [Byles, J.—That seems to be a distinct authority for what just now fell from the Lord Chief Justice.] If an action will lie against this defendant, when would the Statute of Limitations begin to run? Would it be from the time the actual damage was sustained, or from the time the premises were first suffered to be ruinous? [Erle, C. J.—In Humphries v. Brogden, 12 Q. B. 739 (E. C. L. R. vol. 64), an action on the case was brought by the occupier of the surface of land for negligently and improperly, and without leaving any sufficient pillars and supports, and contrary to the custom of mining in the country where the land was situate, working the subjacent minerals, per quod the surface gave way. It was proved on the trial that the plaintiff was in occupation of the surface, and the defendant of the subjacent minerals; but there was no evidence how the occupation of the superior and inferior strata came into different hands. The surface was not built upon. The jury found that the defendant had worked the mines carefully and according to custom, but without leaving sufficient support for the surface: and it was held, that, upon this finding, the

(a) Abolished by 3 & 4 W. 4, c. 27, s. 36.

plaintiff was entitled to have the verdict entered for him: for that, of common right, the owner of the surface is entitled to support from the subjacent strata; and, if the owner of the minerals removes them, it is his duty to leave sufficient support for the surface in its natural state. There was a recent case before the court of criminal appeal where the majority of the judges held that an indictment would lie against the occupiers of a house in the city for keeping therein large quantities of a highly inflammable article, to the nuisance and danger of the neighbourhood: The Queen *v.* Lister and Biggs, 7 Cox's C. C. 342. There was no *intervention of any act of a free agent here between the damage and the wrong of the defendant in suffering the premises to be out of repair.] [*383 In Bonomi *v.* Backhouse, 1 Ellis, B. & E. 622 (E. C. L. R. vol. 96), the declaration alleged that the plaintiff was owner of the reversion of a messuage entitled to the support of the underground mines and earth of the contiguous ground, and that the defendant, well knowing, &c., negligently, and without leaving proper support, worked the mines under the contiguous land, and kept and continued the messuage, and caused it to remain, without proper support; whereby it became injured. To this declaration the defendant pleaded that the cause of action did not accrue within six years. It appeared that the messuage was an ancient house, and that the defendant, *more than six years before action brought*, worked the mines at 280 yards' distance from the house, in such a manner that the earth intervening between the place of working and the foundation of the house gradually gave way, and finally, *within six years of action brought*, the effect reached the foundation of the house, which was thereby injured. Till within the six years no actual damage to the house occurred, nor was the act of the defendant known to the plaintiff. It was held by the Court of Queen's Bench,—Lord Campbell, Coleridge, J., and Erle, J. (Wightman, J., dissenting),—that the defendant was entitled to the verdict. But that judgment was reversed in the Exchequer Chamber.(*a*) [ERLE, C. J.—There, Backhouse was the person who removed the supports.] The present defendant has done no act to identify himself with the nuisance complained of. He let the premises subject to an obligation on the part of the lessee to repair them. [KEATING, J.—If the obligation on the lessee to repair is to exonerate the lessor, *should not the latter have pleaded it?] [*384 It is for the plaintiff to show the existence of a state of things for which the defendant is responsible: this he fails to do if upon the face of his declaration it is left in doubt upon whom the legal obligation to repair is cast. In short, to entitle him to maintain this action, it was incumbent on the plaintiff to make out that there was an existing actionable nuisance at the time of the demise, and that the lessor has somehow warranted the lessee in continuing the premises in their dangerous condition.

Phipson, contrà.—This declaration alleges that the defendant was owner and possessed of a certain building and a stack of chimneys, parcel thereof, near to the plaintiff's premises, that the chimneys then and from thence continually, &c., were in a dilapidated state and in danger of falling, and that the defendant let the premises in that state to Batt, and kept and maintained and continued kept and maintained the same in such

(*a*) And the decision of the Exchequer Chamber has been affirmed by the House of Lords, Sess. 1861.

dangerous condition, until they fell and damaged the plaintiff's premises. That is a substantive allegation of an intentional act of the defendant which is productive of injury to the plaintiff. In Leslie *v.* Pounds, 4 Taunt. 649, the house was let to a tenant, who had gone out of it in order that the repairs might be done; and the landlord, who had taken upon himself to order the repairs, and superintended them, though they were to be paid for by the tenant, was held liable for an injury done to a third person by reason of the cellar-flap having been negligently left open. So, here, it is the landlord who is responsible for the condition the premises are in, though they are in the occupation of a tenant. Can it be said that this is an immaterial allegation? [ERLE, C. J.—The defendant simply abstains from doing anything to arrest the progress of *decay. Is that a cause of action?] It may be that he pre-
*385] vented his tenant from repairing. [ERLE, C. J.—If the fact were so, it might have been alleged.] It may be conceded that there is no case precisely in point. Rich *v.* Basterfield, 4 C. B. 783 (E. C. L. R. 56), is very distinguishable. The chimney built by the defendant was harmless until the tenant lighted a fire. But, here, the stack of chimneys, independently of the mode of occupation of the premises, remained in such a condition that they must produce injury if nothing was done to prevent it, and therefore the action is clearly maintainable. In The King *v.* Pedly, the counsel for the defendant says,—"In all the cases cited,(*a*) the defendant had been guilty of either creating or permitting the nuisance: neither of which can be charged here. It is true, that, if a nuisance be committed, the liability may be fixed upon the person for whose benefit it was committed; and it is also true, that, when, as in The King *v.* Moore, 3 B. & Ad. 184 (E. C. L. R. vol. 23), a building is so erected, or disposed of, that the inevitable, or perhaps even the probable, consequence is a nuisance, the person so erecting or disposing of it is indictable." And Lord Denman adopts that as the principle on which he founds his judgment. It may be conceded that this declaration shows no actual damage at the time of the demise to Batt: but it shows a state of things which in law amounts to a nuisance and gives a cause of action, viz. the defendant's keeping his property in so dangerous a condition as to be likely to fall: Fitz. N. B. 127. Here, the defendant receives rent for the occupation of premises which are in
*386] such a condition as to render them a nuisance. In Vaughan *v. Menlove, 3 N. C. 468 (E. C. L. R. vol. 32), 4 Scott 244, it was held that an action lay against a party for so negligently constructing a hayrick on the extremity of his land, that, in consequence of its spontaneous ignition, his neighbour's house was burnt down. Would not the action equally have lain if the defendant had sold the hay the day before the fire, and had caused it to be on the spot where he had built the rick?

Honyman, in reply.—The declaration does not charge any active interference by the defendant. To render the lessor liable, the nuisance which is complained of must have existed at the time of the demise so as to be then actionable. There is nothing on the face of this declaration to show that the premises in question were in such a state at the time of the demise to Batt. In Tenant *v.* Goldwin, 1 Salk. 21, 360, 2

(*a*) Brent *v.* Haddon, Cro. Jac. 555; Rosewell *v.* Prior, 2 Salk. 460, 1 Lord Raym. 713, 12 Mod. 635; and Cheetham *v.* Hampson, 4 T. R. 318.

Ld. Raym. 1089, it was assumed that the defendant was occupier as well as owner of the adjoining house. Vaughan *v.* Menlove is no authority for the defendant. The true ground of the decision in The King *v.* Pedly, is, that the defendant continued the nuisance: he was guilty of something which was per se actionable. In Comyns's Digest, *Action upon the Case for a Nuisance* (A.), several instances are given, all of which suppose the damage to result from the immediate act or default of the defendant. In Penruddock's Case, 5 Co. Rep. 101, it was objected, "that, when a wrong and injury is done by levying of a nuisance for which an action lies, that, if he who has the freehold to which the nuisance is done conveys it over, now this wrong is remediless; as, if the lord encroaches rent of his tenant, the tenant cannot avoid this wrong in an avowry, but in an assize, or a cessavit, or a ne injuste vexes, he may. But, if the tenant to whom the wrong is done enfeoffs another, his feoffee shall never avoid *this wrong; for, he shall take the land in the same plight as it was given him: and that appears [*387 by 33 E. 3, Avowry 255, and 18 E. 2, Avowry 217, and 4 E. 2, Avowry 201. Also, if a man be seised of land to which common is appendant, and he is disseised of the common, upon which he brings an assize, and afterwards enfeoffs another of the said land, the common is extinct for ever: and therewith agrees 4 E. 3; wherefore they conceived that the feoffee should not have the said quod permittat to avoid the wrong and nuisance made in the time of his feoffor. But it was answered and resolved, that the dropping of the water in the time of the feoffee is a new wrong, so that the permission of the wrong by the feoffor or his feoffee to continue to the prejudice of another, should be punished by the feoffee of the house to which, &c.; and, if it be not reformed after request made, the quod permittat lies against the feoffee, and he shall recover damages, if he do not remove it; but, without request made, it doth not lie against the feoffee, but against him who did the wrong it lies without any request made, for, the law doth not require any request to be made to him who doth the wrong himself." So, in Fay *v.* Prentice, 1 C. B. 828 (E. C. L. R. vol. 50), the erection which caused the nuisance was put up and continued by the defendant. And see the notes to Ashby *v.* White (2 Ld. Raym. 938, 1 Salk. 19, 3 Salk. 17, Holt 524, 6 Mod. 45), 1 Smith's Leading Cases 212, et seq. Here, the plaintiff is a reversioner; and the injury complained of is a mere injury to the possessory right. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court:—(*a*)

*In this case the plaintiff's right to sue some one in respect of the damage he sustained from the fall of the defendant's chimneys [*388 was not denied; so that it is not necessary for us to advert to the authorities on the rights of parties in respect of adjoining premises, nor to say whether the writ de domo reparandâ lay at common law, as is said in Co. Litt. 56 a, or only by local custom, as is said by Lord Holt in Tenant *v.* Goldwin, 2 Lord Raym. 1089, or to consider what were the rights of a quod permittat issued in a case of nuisance. The point here in contest is, whether the defendant is the proper party to be sued; and as to this point the material allegations are, that the defendant, at the time the cause of action arose, was the reversioner, he having demised the premises to Batt, who was then in occupation, that the chim-

(*a*) Erle, C. J., Williams, J., Byles, J., and Keating, J.

neys were ruinous and in danger of falling, and were known by him to be so at the time when he demised them to Batt; and that he the defendant kept and maintained them in such ruinous and dangerous state.

Upon these facts, the defendant contended that the action should lie against the lessee in occupation, and not against himself, being only the reversioner: and he cited Cheetham *v.* Hampson, 4 T. R. 318, where the action was for non-repair of fences, and was held not to lie against the landlord, and Russell *v.* Shenton, 3 Q. B. 449 (E. C. L. R. vol. 43), 2 Gale & D. 573, where the action for not cleansing the drains and sewers was also held not to lie against the landlord.

On the other hand, the plaintiff contended, that, in many cases, the party suffering damage from a nuisance had the option of suing either the lessee in occupation or the lessor. Thus, where the damage was from the non-repair of the trap-door over a cellar, and it appeared that it was the duty of the lessor to do this repair, as between him and the
*389] lessee, it was held *that the action lay against the lessor: Payne *v.* Rogers, 2 H. Bla. 348. And, where the damage arose from a wrongful act of the defendant, in erecting a wall which obstructed the plaintiff's light, and the defendant had before action brought leased the premises to a party who was then in possession, still the lessor was held liable for the continuance of the wall after the lease, because it existed at the time of the demise: Rosewell *v.* Prior, 2 Salk. 460, 1 Lord Raym. 713, 12 Mod. 635. So, where the lessor demised houses either with a privy or with a right of resorting thereto, it was held, that, if he demised the privy either when it had become a nuisance, or if he had the duty of cleansing it after it became a nuisance, he might be indicted for the nuisance; and, if he demised the houses with the use of the privy only, he would be the occupier, and so clearly liable: The King *v.* Pedly, 1 Ad. & E. 822 (E. C. L. R. vol. 28), 3 N. & M. 627 (E. C. L. R. vol. 28).

These cases are authorities for saying, that, if the wrong causing the damage arises from the non-feasance or the mis-feasance of the lessor, the party suffering damage from the wrong may sue him. And we are of opinion that the principle so contended for on behalf of the plaintiff is the law, and that it reconciles the cases.

In Cheetham *v.* Hampson, it was held that the action did not lie against the landlord for non-repair of the fences, because he had no duty to repair them, and therefore was guilty of no wrong in non-repair. So, in Russell *v.* Shenton, the court assumed that the lessor was not bound to cleanse the drains during the demise, and so was guilty of no wrong. So, in Rich *v.* Basterfield, 4 C. B. 783 (E. C. L. R. vol. 56), the lessor was held not liable for the damage occasioned by smoke from the fires which the lessee chose to make: but the reasoning of the judg-
*390] ment assumes it to be law that the lessor may be *liable in cases of nuisance, if he had been guilty of a wrong causing the damage which made a cause of action. This is expressed in many parts of the judgment, but more particularly in page 805, commenting on The King *v.* Pedly, and saying,—"If the lessor had demised the buildings when the nuisance existed, or had re-let them after the user of the buildings had created the nuisance, or had undertaken the cleansing and had not performed it," we think he would have been made liable properly.

In the present case, it is alleged that the defendant let the houses

when the chimneys were known by him to be ruinous and in danger of falling, and that he kept and maintained them in that state; and thus he was guilty of the wrongful non-repair which led to the damage, and after the demise the fall appears to have arisen from no default of the lessee, but by the laws of nature.

We therefore hold that the action lies against the lessor, and the judgment is for the plaintiff. Judgment for the plaintiff.

The owner of premises who leases them when they are already a nuisance or must become so from user, and receives rent, is liable for damage to a stranger happening therefrom, whether in or out of possession; though it is otherwise where the nuisance arises solely from the act of the tenant: Owings *v.* Jones, 9 Maryl. 108; Staple *v.* Spring, 10 Mass. 79; Waggoner *v.* Jermaine, 3 Denio 306; Fish *v.* Dodge, 4 Denio 311; House *v.* Metcalf, 27 Conn. 632; Smith *v.* Elliott, 9 Barr 345. In Godley *v.* Haggerty, 8 Harris 387; affirmed in Carson *v.* Godley, 2 Casey 111; it was held that where the owner of real estate erected thereon a row of buildings with the intention of renting them to the government as bonded warehouses, and with the knowledge that they would be obliged as such to sustain very great weights, he was liable in damages for an injury to a person employed in one of the stores, occasioned by its fall, after having been so rented, though the immediate cause of the accident was the storage of heavy merchandise in an upper story, it appearing that the buildings had been constructed on a defective plan, and of insufficient strength.

But this liability is not confined to the landlord, or the original creator of the nuisance. A tenant, and the same rule applies to a grantee of real estate, is equally liable for the continuance of an injurious erection which existed at the commencement of his tenancy, or at the time of his purchase: Brown *v.* Cayuga, &c., Railroad Co., 2 Kern. 486; Pittsburg *v.* Moore, 44 Maine 154; Morris Canal *v.* Ryerson, 3 Dutch. Hubbard *v.* Russell, 24 Barb. 404. It has been generally held, however, that before the tenant or grantee can be made liable under such circumstances there must be an express request or notice to remove the nuisance, on the ground that an innocent purchaser or lessee might otherwise be compelled to suffer for the act of another: Woodman *v.* Tafts, 9 N. H. 88; Johnson *v.* Lewis, 13 Conn. 307; Pierson *v.* Glean, 2 Green 36; Pittsburg *v.* Moore, 44 Maine 154; Cromelien *v.* Coxe, 30 Alab. 318; Hubbard *v.* Russell, 24 Barb. 404; Beavers *v.* Trimmers, 1 Dutch. 97. But in some recent decisions, it has been laid down that such notice is only necessary where the party is a mere passive agent in the continuance of the nuisance, as by suffering a mill-dam wrongfully erected to remain on the land; and that where the injury is to be attributed in part to his own acts or neglect, with the consequences of which he is acquainted, suit may be brought without any such preliminary warning: Morris Canal *v.* Ryerson, 3 Dutch. 457; Cromelien *v.* Coxe, 30 Alab. 318. If this distinction means no more than that express notice is not necessary for one who already knows he is doing a wrongful act, it may be readily agreed to: but if it is to be extended to that class of cases where a grantee or lessee uses the premises as he finds them, whether actively or not, supposing himself to have the right to do so, it might occasion some practical injustice. It would at any rate be contrary to the language at least of the previous authorities. There can be no doubt, however, that the objection of want of notice should be taken on the trial of the case, and cannot be raised on appeal: Brown *v.* Cayuga Railroad Co., 2 Kern. 4[illegible]

*391] *EVANS *v.* REES. *Nov.* 17.

The 21 Jac. 1, c. 16, s. 6,—which provides, that, in actions for slanderous words, if the plaintiff recovers less than 40*s.* damages, he shall only recover the same amount of costs,—is not repealed by the 3 & 4 Vict. c. 24.

THIS was an action for words spoken of the plaintiff in the Welsh language, imputing felony. The cause was tried before Bramwell, B., at the last Summer Assizes at Cardigan. There was no special damage alleged or proved; and the jury found for the plaintiff, with 1*s.* damages.

The learned baron having certified under the 3 & 4 Vict. c. 24, s. 2, the master on taxation allowed the plaintiff his full costs.

G. Denman, on a former day in this term, obtained a rule nisi to review the taxation, on the ground that the learned judge had no power to certify. He referred to the 21 Jac. 1, c. 16, s. 6, and 3 & 4 Vict. c. 24, s. 2, Gray on Costs, pp. 204–208, and to the cases of Surman *v.* Shelleto, 3 Burr. 1688, Collier *v.* Gaillard, 2 W. Bla. 1062, Turner *v.* Horton, Willes 438, and Goodall *v.* Ensell, 2 C. M. & R. 249,† 5 Tyrwh. 793, 3 Dowl. P. C. 743. [WILLIAMS, J.—If the words were actionable of themselves, the statute of James being unrepealed, my Brother Bramwell had no power to certify.]

Mellor, Q. C., now showed cause.—The certificate was properly made, the 21 Jac. 1, c. 16, s. 6, being impliedly repealed by the 3 & 4 Vict. c. 24, s. 2. [BYLES, J.—Do you admit that the words were actionable in themselves?] It cannot be denied that they were so. Prior to the passing of Lord Denman's act, the statutes applicable to this subject were the 43 Eliz. c. 6, the 21 Jac. 1, c. 16, s. 6, and the 22 & 23 Car. 2, c. 9, s. 136. The 43 Eliz. c. 6, "for avoiding the infinite number of small and trifling
*392] suits commenced or prosecuted against *sundry Her Majesty's good and loving subjects in Her Highness' courts at Westminster (which by the due course of the laws of this realm ought to be determined in inferior courts in the country), to the intolerable vexation and charge of Her Highness' subjects," enacted, in s. 2, that, if upon *any action personal* to be brought in any of Her Majesty's courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and so signified and set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court shall not amount to the sum of 40*s.* or above, that in every such case the judges and justices before whom any such action shall be pursued shall not award to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions." The 21 Jac. c. 16, s. 6, enacted, that, "in all actions upon the case for slanderous words, to be sued or prosecuted by any person or persons in any of the courts of record at Westminster, or in any court whatsoever that hath power to hold plea of the same, if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under 40*s.*, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same, any law, statute, custom, or usage to the contrary in any wise

notwithstanding." And the 22 & 23 Car. 2, c. 9, s. 136, "for prevention of trivial and vexatious suits in law, whereby many good subjects of this realm have been and are daily undone, contrary to the intention of the 43 Eliz. c. 6, for *avoiding of infinite numbers of small and trifling suits commenced in the courts at Westminster," enacted, "for making the said law effectual," that, "in all actions of trespass, assault and battery, *and other personal actions*, wherein the judge at the trial of the cause shall not find and certify under his hand upon the back of the record that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under the value of 40*s*., shall not recover or obtain more costs of suit than the damages so found shall amount unto." Then came the 3 & 4 Vict. c. 24, the intention of which evidently was to produce uniformity in respect of costs in all frivolous suits. The 1st section recites the 43 Eliz. c. 6, and the 22 & 23 Car. 2, c. 9, and that "the same evil, notwithstanding, doth still prevail and increase, and it is expedient to make further provisions for the prevention thereof," and enacts that the 43 Eliz. c. 6, so far as it relates to costs in actions of trespass or trespass on the case, and so much of the 22 & 23 Car. 2, c. 9, as relates to costs in personal actions, be repealed. The 2d section then enacts, that, "if the plaintiff in any action of trespass or trespass on the case brought or to be brought in any of Her Majesty's courts at Westminster, &c., shall recover by the verdict of a jury less damages than 40*s*., such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought *to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious." The repealing clause (s. 1) in terms is confined to the 43 Eliz. c. 6, and 22 & 23 Car. 2, c. 9: the 21 Jac. c. 16, seems to have been altogether overlooked. Goodall *v.* Ensell, 2 C. M. & R. 249,†—which decided, upon the authority of Turner *v.* Horton, Willes 438, and Grenfell *v.* Pierson, 1 Dowl. P. C. 409, that, where in an action for slander spoken of a person in the way of his trade, the plaintiff recovered less than 40*s*. damages, he was entitled to no more costs than damages, and that the judge had no power to certify to entitle the plaintiff to full costs,—was decided before the passing of the 3 & 4 Vict. c. 24, the language of which is as large as can be, and which of necessity repeals the statute of James by implication. In Gillett *v.* Green, 7 M. & W. 347,† it was held that an action on the case for the infringement of a patent is within the operation of the 3 & 4 Vict. c. 24, s. 2, which, as Parke, B., observed, "applies 'to any action of trespass on the case.'" In Marriott *v.* Stanley, 2 Scott 60 (E. C. L. R. vol. 30), 1 M. & G. 853 (E. C. L. R. vol. 39), it was held that the operation of the 3 & 4 Vict. c. 24, s. 2, is not limited to cases in which the judge has power to certify. To the same

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effect is the case of Taylor v. Rolf, 5 Q. B. 337 (E. C. L. R. vol. 48), D. & M. 229. In Newton v. Rowe, 1 C. B. 187 (E. C. L. R. vol. 50), in an action for a libel, the defendants pleaded not guilty and several pleas of justification: the plaintiff recovered a verdict upon all the issues, damages ¼*d.*; and it was held that he was deprived of costs by the 3 & 4 Vict. c. 24, s. 2. The 19 G. 2, c. 22, s. 1, enacted, that, "if at any time from and after, &c., any master or owner, or any person acting as master, of any ship, pink, crayer, lighter, keil-boat, or other vessel *whatsoever, shall cast, throw out, or unlade, &c., any ballast, rubbish, gravel, earth, stone, wreck, or filth, but only upon the land where the tide or water never flows or runs, &c., it shall be lawful for any one or more justice or justices, &c., to summon, &c., the master or masters, owner or owners of any ship," &c.: and the 11th section of the 54 G. 3, c. 159, enacted, that, "if the owner, master, or other person having the charge or command of any private ship of war, transport, or other private or merchant ship or vessel, lighter, barge, boat, or other craft whatsoever, &c., or any other person or persons whatsoever, shall cast, &c., either from or out of any such ship, &c., any ballast, stone, slate, gravel, earth, rubbish, wreck, or filth, into any of such ports, roads, roadsteads, harbours, havens, or navigable rivers of this kingdom as aforesaid, so as to tend to the injury or obstruction of the navigation thereof, &c., all and every such person or persons so offending shall for every such offence forfeit and pay a sum not exceeding the sum of 10*l.*" &c.: and it was held that this latter provision operated by way of substitution for that part of the former provision which made it an offence to throw out of any vessel in a navigable river, ballast, rubbish, &c., so as to obstruct the channel or prejudice the navigation therein; and therefore that a conviction under the earlier statute for such an offence was bad: Michell, app., Brown, resp., 28 Law J., M. C. 53. Lord Campbell there says: "If a later statute again describes an offence created by a former statute, and affixes a different punishment to it, varying the procedure, and giving an appeal where there was no appeal before, we think that the prosecutor must proceed for the offence under the later statute. If the later statute expressly altered the quality of the offence, as, by making it a misdemeanour instead of a felony, or a felony instead of a *misdemeanour, the offence could not be proceeded for under the earlier statute: and the same consequence seems to follow from altering the procedure and the punishment. The later enactment operates by way of substitution, and not cumulatively, giving an option to the prosecutor or the magistrate." Two cases of The King v. Davis, 1 Leach C. C. 271, and The King v. Cator, 4 Burr. 2026, were cited, where statutes were held to be repealed by later enactments merely altering the degree of punishment for the offence. There can be no doubt that the object of the 3 & 4 Vict. c. 24, was, to introduce uniformity with regard to costs in *all* actions of a frivolous description. And, when we find a provision in general terms applying to every personal action, it seems absurd that the statute of James, as to oral slander, should be held to be still alive.

Denman, in support of his rule.—The 21 Jac. 1, c. 16, is not repealed by the 3 & 4 Vict. c. 24. No rule of construction is more clear than this, that a prior statute is not to be held to be by implication repealed by a later statute, if the two may exist together. By the 21 Jac. 1, c.

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16, s. 6, a plaintiff who recovers less than 40*s.* in an action for oral slander, is to have no more costs than damages: and the 3 & 4 Vict. c. 24, s. 2, enacts that if the plaintiff in *any* personal action shall recover less than 40*s.* damages, he shall have no costs unless the judge certifies. There is no reason why these two statutes should not stand together. The rule is thus stated in Broom's Legal Maxims, 3d edit. 27:—"It is an elementary and necessary rule, that a prior statute shall give place to a later,—Lex posterior derogat priori. Non est novum ut priores leges ad posteriores trahantur, provided the intention of the legislature to repeal the previous statute be expressed in clear and unambiguous language, and be not merely *left to be inferred from the subsequent statute. For, a more ancient statute will not be repealed [*397 by a more modern one, unless the later expressly negative the former, or unless the provisions of the two statutes are manifestly repugnant, in which latter case the earlier enactment will be impliedly modified or repealed: implied repeals, moreover, are not favoured by the law, since they carry with them a tacit reproach that the legislature has ignorantly and without knowing it made one act repugnant to and inconsistent with another; and the repeal itself casts a reflection upon the wisdom of former parliaments. 'The rule,' says Lord Hardwicke (Middleton *v.* Crofts, 2 Atk. 675), 'touching the repeal of laws, is, leges posteriores priores contrarias abrogant; but subsequent acts of parliament in the affirmative, giving new penalties, and instituting new methods of proceeding, do not repeal former methods and penalties of proceeding ordained by preceding acts of parliament, without negative words.' Where, then, both acts are merely affirmative, and the substance such that both may stand together, the later does not repeal the former, but they shall both have a concurrent efficacy." And for this numerous authorities are referred to. There is nothing in the language of the 3 & 4 Vict. c. 24, which would make it repugnant or inconsistent for the 21 Jac. 1, c. 16, s. 6, to stand with it. Without a certificate under the statute of Victoria, it may be that a plaintiff who recovers less than 40*s.* damages in slander would get no costs; with such certificate, he would have such costs as he would have had if the 3 & 4 Vict. c. 24, had not passed. None of the cases cited at all affect the question: in none of them did the statute of James come under consideration: and it is impossible to dispute the good sense of the decision in Michell *v.* Brown. [BYLES, J.—It may be that the statute of James may be repealed *by the enacting part of the 3 & 4 Vict. c. 24, and that the proviso [*398 takes this case out of the repealing clause, and so leaves the former statute in full force.] The effect of these statutes is thus stated in Gray on Costs 108,—"The law as to verdicts for less damages than 40*s.* stands thus:—In actions on the case for slanderous words merely, if the plaintiff recovers less than 40*s.*, he can have no more costs than damages, and the judge has no power to give him costs: Goodall *v.* Ensell, 2 C. M. & R. 249,† 5 Tyrwh. 793, 3 Dowl. P. C. 743. In other actions on the case, and in actions of trespass, if the plaintiff recovers less than 40*s.*, he can have no costs whatever, unless the judge certifies that the action was brought to try a right besides the mere right to recover damages, or that the trespass was wilful and malicious, or unless it be suggested on the roll that the action was for a trespass to lands, &c., after notice." And the learned author adds in a note:

"This is by virtue of the statute 21 Jac. 1, c. 16: but that statute does not extend to cases where the words are actionable only by reason of special damage (Brown *v.* Gibbons, 2 Ld. Raym. 831, 1 Salk. 206, Turner *v.* Horton, 2 Barnes 132, Willes 438: and see Savile *v.* Jardine, 2 H. Bla. 532, Grenfell *v.* Pierson, 1 Dowl. P. C. 406), nor to slander of title (Law *v.* Harwood, Cro. Car. 140), nor to actions of libel (Greaves *v.* Warner, Hullock on Costs, 2d edit. 28, Tidd's Pr. 8th edit. 997). Such actions are actions on the case within the 3 & 4 Vict. c. 24, and in them the judge has power to certify under that statute, and so give the plaintiff costs."

ERLE, C. J.—I am of opinion that Mr. *Denman* is entitled to have his rule made absolute. It appears to me that the 3 & 4 Vict. c. 24, s. 2, does not conflict with the 21 Jac. 1, c. 16, s. 6, so as to repeal it, but *399] *that both enactments may well stand together. The 2d section of the 3 & 4 Vict. c. 24 enacts, that, "if the plaintiff in any action of trespass or trespass on the case brought or to be brought in any of Her Majesty's courts at Westminster, &c., shall recover by the verdict of a jury less damages than 40*s.*, such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default,—unless the judge or presiding officer before whom such verdict shall be obtained shall immediately afterwards certify," &c. I give that section its full application. Here is an action for slander, which is an action of the description there mentioned, in which the plaintiff has recovered less than 40*s.* damages, and therefore, in the absence of a certificate, he would be entitled to no costs. The learned judge, however, has certified; and the question between the parties, is, what is the effect of that certificate. I think the effect of it is, to take the case out of the enacting part of s. 2, and to leave the plaintiff in the same position with respect to costs as he would have been in if the 3 & 4 Vict. c. 24 had never passed. In cases where the Statute of Gloucester (6 Edw. 1, c. 1) applies, this would give the plaintiff his full costs; but, where the right under the Statute of Gloucester is qualified by any subsequent statute, the certificate under the 3 & 4 Vict. c. 24 leaves the plaintiff with that qualified right. Construing the statutes with that aspect, the plaintiff here is entitled to the same costs as he would have been entitled to if the 3 & 4 Vict. c. 24 had not passed; that is, before the 21 Jac. 1, c. 16, to full costs, and, after the passing of that statute, to as much costs as damages. This is the view taken by Mr. Gray in his book on Costs, whose opinion, though not authority, is nevertheless entitled to great respect.

*400] *BYLES, J.(*a*)—I am of the same opinion. It is unnecessary to say whether the first part of the 2d section of the 3 & 4 Vict. c. 24 does or does not repeal the 21 Jac. 1, c. 16, s. 6. The words are certainly very large: but at the same time it is to be observed that the two statutes which are recited in the preamble, viz., the 43 Eliz. c. 6, and the 22 & 23 Car. 2, c. 9, s. 136, when referred to, will be found to be both statutes giving or taking away costs at the discretion of the judge. No doubt, the construction of this statute depends upon the effect which is to be given to the proviso enabling the judge to certify. Where the plaintiff in an action for slander recovers less damages than

(*a*) Williams, J., was engaged in the Divorce Court.

40*s.*, two difficulties lie in the way of his recovering full costs: the first is, the provision in the statute of James, which gives him no more costs than damages; the other is, the enactment in the 3 & 4 Vict. c. 24, s. 2. The proviso in this latter section removes the obstacle so far as the 3 & 4 Vict. c. 24 goes, by enabling the judge to certify. Having by his certificate taken the case out of the 3 & 4 Vict. c. 24, the judge takes it out of any implied repeal of the statute of James, and remits the plaintiff to his rights as they stood under that statute,—that is, to his right to 1*s.* damages and 1*s.* costs.

KEATING, J.—I am of the same opinion. Mr. *Mellor's* argument would have been strong to show that the 21 Jac. 1, c. 16, s. 6, was virtually repealed, if the 3 & 4 Vict. c. 24 had contained an express enactment that a plaintiff recovering less than 40*s.* damages in any personal action should have no costs. But that is not so. He is only deprived of costs where the judge declines to certify. If the judge does certify, the case *is taken out of the enacting part of the 2d section, and is left to the operation of the 21 Jac. 1, c. 16, which gives the plaintiff no more costs than damages. Rule absolute. [*401

LEWIS *v.* THE MAYOR, ALDERMEN, and CITIZENS of the City of ROCHESTER. *Nov.* 13.

The mayor and assessors of the borough of R. having refused to revise the lists of burgesses of certain parishes within the borough, on the ground that they had not been published within the time prescribed by the Municipal Corporation Act, 5 & 6 W. 4, c. 76, s. 15; and having rejected certain notices of claim and objections, on the ground that they had not been *personally* delivered to the town clerk,—the parties thus disfranchised obtained writs of mandamus to compel the succeeding mayor and assessors to hold another court to revise the lists.

The corporation under their seal retained the plaintiff as their attorney to defend them against these proceedings, but the defences substantially failed:—

Held, that the plaintiff was entitled to maintain an action against the corporation for his costs incurred under the retainer; and that, inasmuch as there was nothing to show that the defence was unjustifiable or improper, the expense was chargeable on the borough fund.

THIS was an action for work done and materials provided by the plaintiff as an attorney and solicitor for the defendants upon their retainer, and for fees due to the plaintiff in respect thereof, and for money received by the defendants to the plaintiff's use, and for money due on accounts stated.

The defendants pleaded,—first, never indebted,—secondly, to so much of the plaintiff's claim as related to work done and materials provided, that the said retainer was after the coming into operation of the Municipal Corporation Act, 5 & 6 W. 4, c. 76, and was a retainer for a special purpose only, to wit, to act as an attorney and solicitor to show cause against and otherwise defend seven rules nisi which had been granted by Her Majesty's Court of Queen's Bench, three of which respectively required the mayor and assessors of the said city of Rochester to show cause why a writ of mandamus should not issue directed to *them, commanding them to hold a court to revise a certain list of burgesses of the said city in the parishes in the said rules mentioned, and another of which rules required the said mayor and assessors to show [*402

cause why a writ of mandamus should not issue directed to them, commanding them to hold a court to revise a certain list of burgesses of the said city so far as related to the votes of certain persons therein mentioned, being persons in that rule stated as objected to as not having been entitled to be retained on the list of burgesses of the said city for the parish of St. Nicholas, and two other of which said rules respectively required the said mayor and assessors to show cause why a writ of mandamus should not issue directed to them, commanding them to hold a court of revision and to insert the names of certain persons in the said rules mentioned on the burgess-roll of the said city, and the other of which rules required the said mayor to show cause why a writ of mandamus should not issue, directed to the mayor of the said city, commanding him to insert the names of Larkin Allan and others on the burgess-roll of the said city; and that the said work was done and materials provided by the plaintiff under and in pursuance of the said retainer: that the said city of Rochester was one of the boroughs mentioned and referred to in Schedule A. to the said act annexed; and that the defendants were the corporate body named in that schedule by the said name in which they were sued; and that an election of a treasurer in and for the said borough was made long before the said retainer: that the rights, interests and concerns of the said body corporate could not be and never were in any way prejudiced, injured, or affected by the said rules, or in showing cause against or defending the same, or any of them: and that the borough fund or other property of the said body
*403] corporate *could not be applied for the purpose of paying the plaintiff any money whatever for the said work or materials, nor could the same be subject to any such payment; and that the defendants were not empowered by law to contract any debt or liability for or in respect of the said services or materials.

Issue was joined upon these pleas; and the plaintiff also demurred to the second plea, and issue was joined on such demurrer.

At the trial, before Byles, J., at the sittings in London after Michaelmas Term, 1859, a verdict was taken by consent for the plaintiff for the amount mentioned in the declaration, 531*l.* 10*s.*, subject to the following case:—

The city of Rochester, in the county of Kent, is one of the boroughs mentioned in Schedule A. to the 5 & 6 W. 4, c. 76; and the defendants are the corporation of the said city. The plaintiff was town clerk of the said city from the 19th of December, 1850, until the 9th of November, 1859; and during all that time was and practised as an attorney and solicitor. By the 15th section of the statute, the overseers of every parish within any borough are to make out and deliver to the town clerk on the 5th of September in every year a list of the burgesses in each parish; and the town clerk is to cause copies to be printed of every such list, and to publish the same on every day during the week next preceding the 15th of September. By section 17, every person whose name shall have been omitted from such list, and who shall claim to have his name inserted therein, shall, on or before the 15th of September in every year, give notice thereof to the town clerk in writing; and every person objecting to any other person as not being entitled to have his name retained in such list shall on or before the 15th of September

give notice thereof in writing to the *town clerk, and also to the person objected to. By section 18, the mayor and two assessors [*404 shall hold a court to revise such lists between the 1st and 15th of October in every year; and power is given to them to insert therein or expunge therefrom the names of persons as burgesses. By the 19th section, power is given to adjourn such court, provided that it is not adjourned after the 15th of October in any year. By 7 W. 4 & 1 Vict. c. 78, s. 24, any person whose claim has been rejected or name expunged at the revision of such lists may apply before the end of the term then next following to the Court of Queen's Bench for a mandamus to the mayor for the time being to insert his name upon the burgess roll.

The city of Rochester contains six parishes or parochial districts, namely, St. Nicholas, St. Margaret, Chatham Intra, Cathedral Precinct, Strood, and Frindsbury. It is divided into three wards, viz.: Strood Ward, St. Nicholas Ward, and St. Margaret's Ward. Strood Ward consists of the parishes of Strood and Frindsbury; St. Nicholas Ward consists of the parish of St. Nicholas; and St. Margaret's Ward consists of the parish of St. Margaret and that part of the parish of Chatham lying within the city of Rochester, and the precinct of Rochester Cathedral.

The lists of burgesses in these parishes respectively for the year 1856 were delivered to the plaintiff as such town clerk as aforesaid, by the overseers, on Friday, the 5th of September in that year: the lists for St. Nicholas, Chatham, and Cathedral Precinct, were printed and published on the 6th of September in that year: the lists for the parishes of Strood and Frindsbury were printed and published on the 9th of September in that year; and the list for the parish of St. Margaret was published on the 13th of September in that year. Certain notices of claims to have names *inserted in the burgess-lists for 1856, and [*405 certain notices of objections to the retention of names therein, were left at the residence of the plaintiff as such town clerk as aforesaid on the 15th of September in that year, but were not delivered personally to him. In former years such notices had been in like manner left at the residence of the plaintiff as such town clerk; and on this occasion the servant of the plaintiff to whom the said notices were delivered was authorized by the plaintiff to receive them.

The mayor of the city for the time being (Mr. Furrell) and two assessors (Messrs. Thomas French and John Galer) held a court to revise the lists of burgesses on the 13th of October, 1856; and it was then objected before them that the said lists for the parishes of St. Margaret, Strood, and Frindsbury, had not been published during the time required by the statute in that behalf; and the majority of the court, that is to say, the Mayor, Mr. Furrell, and the said Thomas French, against the opinion of the said John Galer, then rejected the said lists, upon the objections so taken, and refused to revise the same. It was then objected before the said court that the said notices of claims and objections so left at the house of the plaintiff should have been personally delivered to the plaintiff as such town clerk as aforesaid: and the said court, being of that opinion, rejected such notices, and refused to receive the same. In consequence of such rejection and refusal 450 persons were disfranchised in the parish of St. Margaret, 200

in the parish of Strood, and 40 in the parish of Frindsbury. It followed that in the ward of Strood there was no burgess-roll at all, such roll being made up of the burgess-lists of the parishes of Strood and Frindsbury. In the ward of St. Margaret the said roll consisted only
*406] of the lists of the precinct and of the parish of *Chatham Intra, together in number about 40, whereas it had previously consisted of about 490 burgesses. In the list for the parish of St. Nicholas, several who had claimed to be inserted therein were not inserted, because the notices of claim as above mentioned had not been personally served upon the town clerk, while many who were not entitled remained upon the roll because the mayor and Mr. French refused to hear the objections made to them in consequence of the notices, as above mentioned, not having been served personally on the town clerk. An objection was then taken before the said court to the qualification of one William Adam, whose name was inserted in the list of burgesses of and for the parish of St. Nicholas; and the ground of objection so taken, was, that he was not properly rated to the poor's rate of and for that parish, by reason that in the rate book of the said parish the description of qualification of the person rated was written at full length on the top line of each page, and in the lines following where the person was rated for the same qualification it was expressed by two dots, thus „. On this objection, the mayor and Mr. French held the qualification sufficient, but that the owner of it was not properly rated; and they expunged the name of William Adam from the said list:

On the 9th of November, 1856, the mayor (Mr. Furrell) went out of office, and Mr. Manclark was then elected and appointed mayor of and for the said city, and so continued until the 9th of November, 1857.

On the 20th of November, 1856, six rules (which accompanied and formed part of the case) were granted by the Court of Queen's Bench, calling upon the mayor and assessors of the said city of Rochester to show cause why writs of mandamus should not issue commanding them
*407] to hold a court of revision for the *purposes therein respectively mentioned. The first three rules (respectively lettered A, B, and C in the bill of costs thereinafter mentioned) stated the purpose to be, to revise the said rejected lists of burgesses in the said parishes of St. Margaret, of Strood, and of Frindsbury respectively. The fourth (D) stated the purpose to be, to revise the list of burgesses of the said city so far as related to the votes of Edmund Aldersley and others, being persons objected to. The fifth (E) stated the purpose to be, to insert the name of John Hopper on the burgess-roll of the said city: and the sixth (F) stated the purpose to be, to insert the name of the said William Adam, so expunged as aforesaid.

Upon the 25th of November, 1856, a seventh rule (G) was granted by the Court of Queen's Bench (which rule also accompanied and formed part of the case), commanding the said mayor for the time being of the said city to show cause why a writ of mandamus should not issue directed to him, commanding him to insert upon the burgess-roll of the said city the names of Larkin Allan and ninety-seven others therein named, burgesses of the said three parishes of St. Margaret, Strood, and Frindsbury, respectively, and whose names had been in the rejected lists for those parishes. The said seven rules were served on the mayor for the time being of the said city; and the first six rules were served

upon the said assessors soon after the same had been respectively granted; and afterwards, on the 24th of December, 1856, the following retainer was given to the plaintiff by the defendants under their common seal:—

"In the Queen's Bench.

"The Queen *v.* The Mayor and Revising Assessors of the City of Rochester, in the County of Kent (relating to St. Margaret List).

"Same *v.* Same (relating to Strood List).

*"Same *v.* Same (relating to Frindsbury List).

"Same *v.* Same (to hear objections). [*408

"Same *v.* Same (re John Hopper).

"Same *v.* Same (re William Adam).

"Same *v.* The Mayor of Rochester (re Larkin Allan and others).

"James Lewis, town clerk of the said city of Rochester, and an attorney of Her Majesty's Court of Queen's Bench at Westminster, is retained to act by the mayor, aldermen, and citizens of the said city, to show cause in and otherwise defend the seven several above-mentioned matters (rules nisi for mandamuses wherein have been granted). Given under the common seal of the said mayor, aldermen, and citizens, at Rochester aforesaid, this twenty-fourth day of December, 1856."

The giving of this retainer was opposed by a minority of the town council, namely, by three members of the council, there being thirteen present; and the remaining ten voted in favour of the retainer. The three dissentients subsequently protested against it in a protest entered upon the minutes of the corporation, as follows:—

"I (A. B.), town councillor of the city of Rochester, do hereby protest against the application of the funds and property of the city of Rochester for the purpose of defending the Mayor of Rochester and the assessors acting with him in the registration court in the case of the mandamuses recently issued by the Court of Queen's Bench, and also any subsequent legal proceedings likely to arise therefrom."

A protest to the like effect was laid before the council at a meeting held on the 3d of March last.

In pursuance of the said retainer, the plaintiff acted as the attorney of and for the defendants, taking the advice of counsel and the directions of a committee *appointed by the town council in that behalf, in and about showing cause against the said seven rules, [*409 and did the work and expended the moneys in relation thereto as set forth in his bill of costs delivered to the defendants, and which accompanied and formed part of the case.

Cause was shown against the first six of the said rules in Hilary Term, 1857, when the Court of Queen's Bench made the first four rules (A, B, C, and D) absolute for writs of mandamus to issue, upon the ground, as was then stated by the court, that the points raised could be better argued upon returns made to the said writs, and that it was proper to enable either party to take the case into a court of error. In the fifth rule (E) the mandamus had been allowed to issue, but was never served by the prosecutors thereof; and, upon showing cause, the sixth rule (F) was discharged by the court, with costs, which were taxed and paid as between party and party; and the amount received by the plaintiff in respect of such costs is credited at the foot of the bill of costs delivered to the defendants. Returns were made in the first four cases,

and the arguments upon them were heard in Trinity Term, 1857, when judgment was given for the Crown.(*a*)

Before the said arguments, namely, on the 1st of March, 1857, one of the said assessors (Mr. French) had gone out of office, and Mr. Moore had been elected assessor in his place. Error was brought by Mr. French only upon the said judgment of the Court of Queen's Bench in the said four cases; and the arguments were heard in the Court of Exchequer Chamber in Easter and Trinity Terms, 1858, and ultimately, the court having taken time to consider, and being divided *in opinion, the judgment of the Court of Queen's Bench was affirmed. The costs, amounting to about 360*l.*, have been paid. No application has ever been made to have these costs refunded by the corporation.

*410]

The seventh rule (G) was made absolute in Hilary Term, 1857; and the Court of Queen's Bench awarded a peremptory mandamus to insert the names of Larkin Allan and ninety-four of the others mentioned in the said rule on the burgess-roll of the said city: but, on the objection of the said William Manclark, the then mayor of the said city, that the remaining three persons mentioned in the said rule were not entitled to be on the burgess-roll of the said city, taken by his counsel on the motion to make such rule absolute, the names of the said last-mentioned persons were not included in the said peremptory writ of mandamus.(*b*) The insertion of these names enabled those persons whose names were inserted on the said roll for the parishes of Strood and Frindsbury to proceed to an election of a councillor for the Strood ward in the said borough (which ward consisted of the parishes of Strood and Frindsbury); and a mandamus was obtained by one of such persons to the alderman and ward assessors of the said Strood ward to hold a court for the election of such councillor, and the same was served upon the said mayor of the said city; but, before such election took place, a rule nisi was granted by the Court of Queen's Bench, on the application of a Mr. Cobb, calling upon the said mayor and the said ward assessors to show cause why the said writ of mandamus and the said rule G should not be superseded, and why the said election should not be prohibited. A copy of such rule (H) accompanied and formed part of the *case. The ground upon which the court was asked to supersede rule G was, that fraud had been practised upon the Court of Queen's Bench in the obtaining of such rule. In Trinity Term, 1857, the rule H was discharged with costs: the latter part of the plaintiff's bill of costs relates to this rule.

*411]

No retainer was given to the plaintiff by the corporation except as aforesaid.

The question for the opinion of the court was,—whether the plaintiff could maintain this action against the defendants for the whole or for any part of his said bill of costs. If the court should be of opinion that he could, then judgment was to be given for the plaintiff for the whole or for such part of his bill of costs, to be taxed by the proper officer, as the court might think proper. If, however, the court should be of opinion that the plaintiff could not maintain this action against the defendants

(*a*) See The Queen *v.* The Mayor and Assessors of Rochester, 7 Ellis & B. 910 (E. C. L. R. vol. 90), 27 Law J., Q. B. 45, 434, 4 Jurist, N. S. 1227. And see the case in error, 1 Ellis, B. & E. 1024 (E. C. L. R. vol. 96).

(*b*) See 7 Ellis & B. 919, n. (E. C. L. R. vol. 90).

for any part of his bill of costs, then judgment was to be given for the defendants.

Mellish (with whom was *Macnamara*), for the plaintiff.(a)—The main question here is, whether, if a corporation, under its common seal, retain an attorney to *oppose a mandamus which is moved for against the corporation, he can maintain an action for his bill of costs. [*412 The writs in this case were not in terms addressed to the corporation; but they required "the mayor and assessors" to do something connected with their duties as members of the corporation,—to correct a mistake committed by the former mayor. The question resolves itself into two points,—first, whether the contract is good and valid at common law,—secondly, whether the 92d section of the Municipal Corporation Act, 5 & 6 W. 4, c. 76, which regulates the payments to be made out of the borough fund, authorizes the payment of these expenses. It is impossible to entertain a doubt that this would be a good retainer at common law. The only doubt is whether it is an expense which is properly chargeable upon the borough fund. As a general rule, a corporation is liable upon any contract entered into under the corporate seal, unless there be something in it which is contrary to its constitution. [*Lush*, contrà, intimated that he should not contest that point.] The 92d section enacts, that, "after the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities belonging or payable to any body corporate named in conjunction with the said borough in the schedules A. and B., or to any member or officer thereof in his corporate capacity, and every fine or penalty for any offence against this act (the application of which has not been already provided for), shall be paid to the treasurer of such borough; and all the moneys which he shall so receive shall be carried by him to the account of a fund to be called 'The Borough Fund;' and such fund,—subject to the payment of any lawful debt due from such body corporate *to any person, which shall have been contracted [*413 before the passing of this act, and unredeemed, or of so much thereof as the council of such borough from time to time shall be required or shall deem it expedient to redeem, and to the payment from time to time of the interest of so much thereof as shall remain unredeemed, and saving all rights, interests, claims, or demands of all persons or bodies corporate in or upon the real or personal estate of any body corporate by virtue of any proceedings either at law or in equity which have been already instituted or which may be hereafter instituted, or by virtue of any mortgage or otherwise,—shall be applied towards the payment of the salary of the mayor, and of the recorder, and of the police magistrate hereinafter mentioned, when there is a recorder or police magistrate, and of the respective salaries of the town clerk and treasurer, and of

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That this action can be maintained against the defendants, inasmuch as the work was done and materials provided under their retainer sealed with their corporate seal:

"2. That the rights, interests, and constitution of the corporation of the city of Rochester were affected by the said rules for and relating to the writs of mandamus in the special case mentioned:

"3. That the borough fund of the said corporation is liable for the payment of the plaintiff's claim; but, if not, that the plaintiff can nevertheless maintain his said action against the defendants."

every other officer whom the council shall appoint, and also toward the payment of the expenses incurred from time to time in preparing and printing burgess-lists, ward-lists, and notices, and in other matters attending such elections as are herein mentioned, and, in boroughs which shall have a separate court of sessions of the peace as is hereinafter provided, towards the expenses of the prosecution, maintenance, and punishment of offenders, and towards such other sum to be paid by such borough to the treasurer of such county as is hereinafter provided, and towards the expense of maintaining the borough gaol, house of correction, and corporate buildings, and towards the payment of the constables, and of all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this act; and, in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under the direction
*414] of the council, for the *public benefit of the inhabitants and improvement of the borough, &c.; and in case the borough fund shall not be sufficient for the purposes aforesaid, the council of the borough is hereby authorized and required from time to time to estimate as correctly as may be what amount in addition to such fund will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of this act; and, in order to raise the amount so estimated, the said council is hereby authorized and required from time to time to order a borough-rate in the nature of a county-rate to be made within their borough, and for that purpose the council of such borough shall have within their borough all the powers which any justices of the peace assembled at their general or quarter sessions in any county in England have within the limits of their commission by virtue of the 55 G. 3, c. 51, or as near thereto as the nature of the case will admit," &c. Two cases have been decided upon the construction of this section, —Pallister *v.* The Mayor, &c., of Gravesend, 9 C. B. 774 (E. C. L. R. vol. 67), and Payne *v.* The Mayor, &c., of Brecon, 3 Hurlst. & N. 572.† In the former, it was held that a bond given by a corporation after the passing of the 5 & 6 W. 4, c. 76, but before the passing of the 6 & 7 W. 4, c. 104, to secure a sum of money borrowed for the purpose of paying debts contracted by the corporation before the passing of the first-mentioned act is valid, notwithstanding the 92d section of the former act might interpose a difficulty in the way of the obligee's obtaining satisfaction of a judgment thereon. And in the latter it was held that a covenant by a municipal corporation to repay money borrowed by them after the passing of the 5 & 6 W. 4, c. 76, is valid, although the money was not borrowed for any of the purposes to which the borough fund is applicable by the 92d section of that act; and
*415] *although the covenant is contained in a mortgage-deed made without the approbation of the lords of the treasury, as required by the 94th section. Martin, B., there says: "In order to avoid this covenant, it must appear that it was a covenant which the corporation were forbidden by statute to enter into. Then, is there anything in the Municipal Corporation Act which prohibits a corporation from entering into a covenant to pay its lawful debts? It is argued that the 94th section renders this covenant void. But that section only says that it shall not be lawful to mortgage any lands of the corporation, except with the approbation of the lords of the treasury, which was not obtained

in this case; and, although the mortgage may be invalid, there is no reason why the corporation should not be liable on their covenant to repay the mortgage-money." [BYLES, J.—The corporation might peradventure have a large legacy left to it for the purpose of satisfying such of its debts as may not be legally chargeable upon the borough fund.] The case of Holdsworth *v.* The Mayor, &c., of Dartmouth, 11 Ad. & E. 490 (E. C. L. R. vol. 39), is a much stronger case than this. There, in debt against a corporation regulated by the 5 & 6 W. 4, c. 76, on a bond given by them to the plaintiff for payment of 1249*l.*, it appeared on special verdict, that, before the passing of the act, the plaintiff being an alderman of the borough, quo warranto informations were filed against him and several of his friends and relations, to try their right to be members of the corporation, and they were ultimately ousted; that the plaintiff, without authority from the defendants, caused the informations to be defended; and that, before the passing of the act, certain members of the corporation, then being the governing body, and having the custody of the common seal, and lawful power to affix it to instruments, did, on the plaintiff's application, affix the *seal to the said bond, and deliver it to him by way of reimbursement [*416 of the costs of such defences, and for no other consideration; that divers of the then burgesses of the corporation had no notice of the bond being given for that cause; and that the sealing and delivery thereof was without fraud, unless the sealing and delivery for the cause aforesaid was a fraud in law upon the defendants or the inhabitants, or the members of the corporation who did not concur: and it was held, that, on the facts found, the corporation were liable on the bond before the statute 5 & 6 W. 4, c. 76; that the corporation, as subsisting under the statute, were still liable; and that the liability was a "lawful debt" chargeable on the borough fund, within s. 92. It has been held, that, wherever the litigation substantially resolves itself into the question whether A. or B. has been properly elected, neither can be defended at the corporation expense. This is not a case of that kind. The mayor and assessors for the time being, putting an erroneous construction upon the act of parliament, had declined to revise the list of burgesses. Proceedings were instituted against them to compel them to perform their duty; and the mayor in the mean time went out of office, and was succeeded by a new one who had no interest whatever in the question. The true rule is, that all expenses are chargeable on the borough fund which are properly and bonâ fide incurred by the corporation in its corporate capacity, and not for the benefit of individual members. [ERLE, C. J.—The object of the litigation here was, to settle the election of the body who are to elect the town councillors. It is a matter, therefore, that is intimately connected with the existence of the corporation.] The 92d section of the Municipal Corporation Act does not in terms provide for the expenses of any litigation whatever. The question came under the *consideration of Lord Cottenham, C., in The Attorney-General [*417 *v.* The Mayor, &c., of Norwich, 2 Mylne & Cr. 406, where, speaking of the 92d section, his Lordship says (p. 424), "Independently of the provisions of this section, I apprehend it to be quite clear, according to the rule which applies to all cases of trust, that, if necessary expenses are incurred in the execution of a trust, or in the performance of the duties thrown on any parties, and arising out of the situation in which

they are placed, such parties are entitled, without any express provision for that purpose, to make the payments required to meet those expenses out of the funds in their hands belonging to the trust. Such is the rule of this court, and such also is the rule at common law. The cases of The King *v.* The Inhabitants of Essex, 4 T. R. 591, and The King *v.* The Commissioners of Common Sewers for the Tower Hamlets, 1 B. & Ad. 232 (E. C. L. R. vol. 20), establishing the principle at law; are more applicable to this question than most of the cases in this court usually referred to as authorities upon the subject. The defendants in those two cases were public officers, who, having public duties to perform under the authority of acts of parliament, were held to be entitled to pay expenses legitimately and properly incurred, out of the funds of which they were by act of parliament constituted trustees. In The Queen *v.* The Town Council of Lichfield, 4 Q. B. 893 (E. C. L. R. vol. 45), 1 D. & M. 491, the Court of Queen's Bench intimated an opinion that the council of a borough might prosecute at the expense of the corporation for an assault upon the mayor in the execution of his duty: but the opinion of the council must be taken before the prosecution is instituted; and, if this be not done, they cannot afterwards order payment of the costs out of the corporation funds. So, in The Queen *v.* The Town Council of Lichfield, 10 Q. B. 534 (E. C. L. R. vol. 59), where the town council had removed the town clerk from his office, by
*418] *resolution, for misconduct, and refused his claim of compensation, it was held that the costs of an attorney employed in opposing a mandamus to assess compensation were properly chargeable to the borough fund under the 5 & 6 W. 4, c. 76, s. 92, although the jury found the issues ultimately raised on the mandamus for the late town clerk,—it not being shown that the town council acted otherwise than bonâ fide in the removal: and, the attorney having been retained generally by a resolution of the town council, and having also been authorized and retained by resolution of the town council to take proceedings in opposition to the rule nisi for the mandamus,—it was held that this was a sufficient retainer to warrant the payment to him of the costs of defending the issues. In The Queen *v.* Prest, 16 Q. B. 32 (E. C. L. R. vol. 71), the council of a borough passed a resolution prescribing the duties of the town clerk, and fixing his salary for the discharge of such duties at 250*l.* Among other functions, he was "to act as the professional adviser of the mayor and council in the business of the council." And he was to "be paid the usual professional charges for conducting or opposing bills in parliament, conducting actions or suits at law or in equity, and preparing leases, conveyances, or securities;" and to "be paid all travelling and other expenses out of pocket." A town clerk (being an attorney) was appointed after the passing of this resolution. Payment of a borough-rate being resisted by a township within the borough, with an intimation that the overseers would not pay anything except under legal obligation, the council directed their finance committee to take such proceedings as they might deem expedient for enforcing payment and maintaining the validity of the rate; the committee were likewise authorized to give bonds of indemnity to overseers and
*419] others employed in the collection. The committee directed the *town clerk to prepare a bond of indemnity to the overseers of the above township, under counsel's advice. The bond was prepared,

and objected to by the overseers. The town clerk, under the direction of the committee, went to London, and attended conferences between counsel for the overseers and for the corporation, with a view to an arrangement. Finally, the form of the rate was altered, proceedings were taken on behalf of the council to compel payment, and the rate was levied. The town clerk then delivered a bill to the corporation, including charges for instructing and advising with counsel upon the bond of indemnity and upon the form of rates; correspondence and conferences with the solicitor for the overseers on the subject of the rate; expenses and loss of time in proceeding to London for the purpose of attending the conferences, in advising on several occasions with counsel, and in journeys to Wakefield and Manchester for the purpose of conferring with the clerks of the peace and town clerks of those boroughs upon the proper forms of rates. The services had been performed under the instructions of the finance committee. The committee ordered payment of the charges, and they were paid. On certiorari bringing their order before the Court of Queen's Bench under the 7 W. 4 & 1 Vict. c. 78, s. 44,—it was held, that the charges, so far as they regarded business done in the direct course of settling a dispute, might properly be allowed by the corporation, as not covered by the salary given for the performance of the ordinary duties of town clerk; and that such charges were payable out of the borough fund. These authorities, it is submitted, conclusively show that the expenses in question are properly chargeable upon the borough fund.

Lush, Q. C. (with whom was *J. D. Coleridge*), for the *defendants.(*a*)—At common law, no doubt, it was competent to a [*420 corporation, like any individual, to make any contract it thought fit. They were the absolute owners of the corporate property. The Municipal Corporation Reform Act, 5 & 6 W. 4, c. 76, however, has altogether changed their character and status, and has converted them into trustees for the inhabitants of the town or borough,—a character which all persons must recognise: The Attorney-General *v.* Aspinall, 2 Mylne & Cr. 613. Lord Cottenham, C., there says: "I am clearly of opinion, that, from the time when the Municipal Corporation Act passed, the corporate property was trust property: and, upon this point, I have the satisfaction of thinking that no material difference exists between my opinion and that of the Master of the Rolls; for, in the notes of his judgment, I find it stated that he expressed such to be his view of this part of the case:" see 1 Keen 513. It is clear, therefore, that since the passing of that act, the corporation cannot dispose of any portion of the corporate funds otherwise than as is directed by the act. So, they are *prohibited from entering into any engagements which are [*421 likely to involve a loss of the corporate property, unless it be for

(*a*) The points marked for argument on the part of the defendants were as follows:—

"1. That no such retainer as is mentioned in the case could be legally given by the corporation of Rochester since the passing of the Municipal Corporations Act, 5 & 6 W. 4, c. 76:

"2. That, as regards rule H, and much of the business charged for in the plaintiff's particulars of demand, no retainer at all was ever given by the defendants to the plaintiff:

"3. That none of the matters in respect of which the plaintiff performed as attorney the services for which he seeks to recover compensation in this action, were matters which can be lawfully charged upon the corporate property or income since the passing of the Municipal Corporations Act; and that no payment in respect of them would be legal, within the provisions of that act, or of any act amending the same or incorporated therewith."

the benefit of the town for which they are trustees. Through the default of the mayor and assessors, a large number of persons were disfranchised; and the corporation gave a retainer to an attorney to resist certain writs of mandamus commanding them to hold courts for the revision of the burgess-lists. The Court of Queen's Bench treated the opposition as frivolous: the only doubt that suggested itself in the case was, whether the court had power to award a mandamus. At the close of the judgment, Lord Campbell says,—7 Ellis & B. 929 (E. C. L. R. vol. 90),—"If the resistance to these writs of mandamus were to succeed, a temptation would be held out to the mayor and assessors in every borough to insure a majority for their party during the ensuing year, by refusing to revise the overseers' lists, or by refusing to consider the list of objections, on such a pretext as that the names are or are not arranged alphabetically; which would not be more frivolous than the pretext that the list of objections had not been personally served upon the town clerk." [ERLE, C. J.—There certainly was an extremely singular obliquity of vision in the persons who made the mistake. The costs are made to fall upon their successors, who were no parties to the blunder. I was an assenting party to the decision in the Queen's Bench: but I must say it was a remarkably bold one,—calling as it did upon the mayor and assessors to hold a court at a day long posterior to the day mentioned in the statute.] It is submitted that the corporation had no right to make a contract to pledge the corporate funds to meet these costs. The assessors are not members of the corporation: the expense, therefore, of their defence, if they chose to resist the proceeding, should have been borne by themselves. If the mayor in his judicial *422] *character makes a mistake, and an action is brought against him, could he charge the expenses of his defence to the funds of the corporation? Clearly not. In The Queen v. The Mayor, &c., of Bridgewater, 10 Ad. & E. 281 (E. C. L. R. vol. 37), a town council ordered a payment from the borough fund for defraying the expenses of opposing two rules, one for a quo warranto against a party who had been declared duly elected a councillor, and had accepted the office, for exercising that office, the other for a criminal information against an alderman of the borough for alleged misconduct at an election of councillors. The payments were made by the treasurer, and his accounts audited. Afterwards the statute 7 W. 4 & 1 Vict. c. 78 passed: and the court, under s. 44, upon the affidavit of a burgess who applied in pursuance of instructions of a subsequent town council, granted a certiorari to bring up the orders of the previous town council, and quashed them. And see The Queen v. The Mayor, &c., of Norwich, 11 Law J., Q. B. 246. Again, in The Queen v. The Mayor, &c., of Leeds, 4 Q. B. 796 (E. C. L. R. vol. 45), on the election of councillors for a borough, a question arose which of two candidates had been duly declared to be elected. The mayor, between the day of declaration and November 9th, took counsel's opinion, on which he acted by rejecting the vote of one of the candidates on the latter day. The council had given the mayor a general authority to take such opinion in case of need. The excluded candidate obtained a rule nisi for a mandamus to the mayor, &c., to receive his vote and permit him to act as a councillor; and the council resolved by a majority that cause should be shown against the rule: it was held that the costs of such opposition, and of the case submitted to counsel,

could not be charged on the borough fund, under statute 5 & 6 W. 4, c. 76, s. 92, though it was sworn that the proceedings were taken bonâ fide, *and not for the purpose of supporting one candidate against the other at the public expense. The Queen *v.* The Town Council of Lichfield, 10 Q. B. 534 (E. C. L. R. vol. 59), was a totally different case from the present: there, a claim was made upon the corporation funds which the corporation were bound to resist. Here, however, the corporation had no interest whatever in the matter in litigation. As to Pallister *v.* The Mayor of Gravesend, 9 C. B. 774 (E. C. L. R. vol. 67), the judgment proceeds upon an obvious fallacy. There, the corporation had, after the passing of the 5 & 6 W. 4, c. 76, borrowed money on bond, for the purpose of paying off debts owing by the corporation before the passing of the act. It was objected that the obligee could not maintain an action upon the bond, inasmuch as an execution upon the judgment could not be enforced against the corporation property. To this it was answered, that, although the fund created by the 92d section of the act could not be made available for the payment of the bond, it did not follow that the corporation might not possess other property which would be available,—things which yielded no profit, such as furniture, paintings, plate, the mace, &c. And this argument is adopted by Maule, J., who says: "It does not follow that the corporation may not have property which is not directly affected by s. 92, and which is at their disposition independently of the act: and I see no reason why property which might be charged or disposed of at the will of the corporation, might not be subject to an execution for the purpose of satisfying a judgment on this bond." The fallacy of that reasoning is, that, if the furniture or the regalia of the corporation were taken in execution and sold, they would have to be replaced out of the borough fund, which would be precisely the same as making the fund primarily liable for the debt. [*423

*_Mellish_ was heard in reply.

Erle, C. J.—I am of opinion that our judgment must be for the plaintiff. Assuming that the 92d section of the 5 & 6 W. 4, c. 76, constitutes the corporation trustees of the borough fund, and that a contract which involves a violation of that trust could not be enforced, having carefully looked at the statement of facts in this case, I am of opinion that no such ground of defence is made out. I by no means, however, admit that such a defence would be available in an action at law. It seems to me that the law is well laid down in the case of The Attorney-General *v.* The Mayor, &c., of Norwich, 2 Mylne & Cr. 406, that the right of a corporation to incur expense is limited to expense incurred in respect of the due performance of the trusts with which they are charged in their corporate capacity. And it seems to me that one of those trusts is the regulation of the constituent body whose duty it is to choose the governing body by whom not only the corporation property is to be disposed of, but the interests of the borough also in many respects. The trust thus reposed in the mayor and those who are at the head of the corporation appears to me to be one of the highest importance. The question which was in litigation between the parties here was one which vitally affected the powers of the constituent body. The mayor and assessors for the time being we must, after the judgment pronounced by the Court of Queen's Bench, and confirmed by the Ex- [*424

chequer Chamber, assume had been guilty of gross ignorance, and by a remarkable mistake of their duty wrongfully disfranchised a very large number of the burgesses of the borough; and the parties grieved came to the Court of Queen's Bench for redress. It was a very grave ques-
*425] tion of law whether the discretionary power *of the Court of Queen's Bench to issue a mandamus to rectify mistakes made by corporations could extend so far as to make this corporation hold courts long after the time appointed by the statute for that purpose, in order to correct the blunder of the late mayor and assessors, and to restore the disfranchised burgesses to the position from which they had been improperly removed in the preceding October. It was a question to my mind to a very great extent affecting the constituent body of the borough; and it was one upon which the mayor was properly called upon to take the opinion of the court. He did contest the point before the Court of Queen's Bench; and acting, I may add, under the support of sound legal advise, he questioned the validity of their decision in the court of error. If he were competently advised that the Court of Queen's Bench had come to a wrong conclusion, he had a right to go to the Exchequer Chamber to endeavour to get that decision reversed, and so to obtain from the other side the costs he had been put to in opposing their proceedings. Where a corporation enters into litigation, its legal advisers are not to be deprived of their compensation because the litigation has not terminated advantageously for them. The question is whether there were reasonable grounds for the defence here. I cannot entertain any doubt that there were. I therefore think there must be judgment for the plaintiff, notwithstanding the argument urged by Mr. *Lush*. There can be no doubt that the action will lie for the expenses incurred under the retainer of the corporation. My judgment does not in the slightest degree interfere with those cases which have held that an action at law may be maintained even though the judgment could not be satisfied out of the borough fund; though, if need be, I should
*426] in this court be prepared to act upon them. But I *have thought it better to rest my judgment upon the main ground.

BYLES, J.(*a*)—I am of the same opinion. I apprehend the law on this subject is clearly enough laid down by Lord Wensleydale in the case of The South Yorkshire Railway Company *v.* The Great Northern Railway Company, 9 Exch. 55, 84,† where he says: "Generally speaking, all corporations are bound by a covenant under their corporate seal properly affixed, which is the legal mode of expressing the will of the entire body, and are bound as much as an individual is by his own deed. Contracts with partnerships stand upon a different footing. They relate to the power of one member of a partnership to bind the other, and constitute a branch of the law of principal and agent.(*b*) In partnerships, where all the members do not concur in the contract (and it is often that they do not), one partner may bind the other in all contracts within the scope of their ordinary partnership dealings; in those beyond, the individual partners making the contract are bound, not the other partners. But corporations, which are creations of law, are, when the seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by

(*a*) Williams, J., was engaged in the Divorce Court.
(*b*) See Hickman *v.* Cox, 18 C. B. 617 (E. C. L. R. vol. 86).

a contract in which all concurred. But, where a corporation is created by an act of parliament *for particular purposes*, with special powers, then indeed another question arises; their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was ultrà *vires,—that is, that the legislature meant that such a deed should not be made." Now, this is not the case of [*427 a corporation created for a particular purpose. It is stated to be an ancient corporation,—whether existing by prescription or by charter does not appear. It therefore falls within the first of the two classes into which Lord Wensleydale divides all corporations. Pallister *v.* The Mayor, &c., of Gravesend, 9 C. B. 774 (E. C. L. R. vol. 67), is in truth a decision to the same effect. I do not at all agree in the observations which Mr. *Lush* has made upon that case. I think it is based upon good sense and sound law. I do not see why property may not be left to trustees for purposes ultrà those mentioned in the 5 & 6 W. 4, c. 76, s. 92. However, be that as it may, Pallister *v.* The Mayor, &c., of Gravesend is in conformity with the decision in The South Yorkshire Railway Company *v.* The Great Northern Railway Company. It seems to me, therefore, that, at all events, this action lies, and the plaintiff is entitled to judgment. Then comes the question,—are these expenses properly payable out of the borough fund? It seems to me that there are two proper objects of corporation expenditure mentioned in s. 92 within which these expenses, or some of them (which is sufficient for the present purpose), fall. The corporation are authorized to apply the borough fund towards the payment, amongst other things, of "the expenses incurred from time to time in preparing and printing burgess-lists, ward-lists, and notices, and in other matters attending such elections as are herein mentioned." Mr. *Mellish* has argued, and with much force, that the expenses in question fall within that head. Another legitimate application of the fund is, the payment of "all other expenses not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this act." Now, one of the provisions of this *act is, that the mayor, aldermen, and other officers for the time being shall be elected by a body constituted [*428 according to law. It seems to me, therefore, that a part at all events of these expenses were properly payable out of the borough fund. Mr. *Lush* felt constrained to admit that the defendants were justified in appearing to the writs of mandamus. It may be that they were *bound* to appear: indeed, I cannot help thinking they would have failed in the performance of their duty if they had not appeared. And surely they were entitled to present their own view of the case in defence of the conduct of their predecessors. It seems to me, therefore, that, as far as appearing and defending to some extent are concerned, the expenses were chargeable on the borough fund. How far the defendants were justified in carrying their defence, and whether there are any items in the particulars of the plaintiff's demand which are objectionable, are questions for another tribunal. The substantial question here is,—first, whether the corporation are liable to judgment in this action,—secondly, if they are, whether they were justified in appearing and defending themselves against the writs of mandamus which had been directed to

them. For the reasons I have given, it appears to me that they were so justified, and that nothing remains but the question of the quantum, which is a matter to be settled elsewhere.

KEATING, J.—I concur with my Lord and my Brother Byles that the plaintiff in this case is entitled to judgment. It seems to me not to have been contested that the defendants had a right to appear to the writs of mandamus; but it is suggested that they should have appeared merely for the purpose of submitting to the judgment of the court. But, if *429] they did appear, and, having done so, failed to inform the *court of the facts upon which its judgment was to be pronounced, their appearance would have been idle, and they would have been open to censure for incurring needless expense. Having, then, a right to appear and to inform the court as to the real facts upon which their judgment should proceed in what seems to have been a very doubtful case,—is there anything upon the facts before us to warrant us in inferring that they proceeded in any way in which they were not justified in proceeding? I cannot find anything in the case to warrant that supposition: and the Lord Chief Justice, who was a member of the Court of Queen's Bench when the matter was before it, and who took part in the decision, and who has intimated a pretty strong opinion as to the case being one of grave doubt and difficulty, has not suggested that there was anything in the proceedings at variance with the statements presented for our decision. Looking at the case as stated, it seems to me that the defendants did no more than what was natural and proper in the conduct of a litigation on which it is conceded they were justified in embarking: and, although it may be a question for the master whether any of the charges were unnecessarily incurred, still, the general proceeding on the part of the defendants does not appear to have been at all improper. I therefore think the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

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*430] *POLE and Another v. CETCOVICH. *Nov.* 23.

By a charter-party, the captain of an Austrian vessel engaged to go to Havana and there load a cargo from the factors of the charterers, and proceed therewith to Falmouth for orders as to his port of ultimate destination, which by a memorandum subsequently endorsed upon the charter-party included Copenhagen. On his arrival at Falmouth on the 18th of June, the captain gave the charterers notice, and was by them ordered (by telegram of the 28th) to proceed to Copenhagen. At this time war had broken out between France and Austria, and there being several French cruisers in the offing, the captain sent a telegram and also a letter apprising the charterers of his danger, and intimating that he awaited their "further decision." On the following day, the charterers sent their clerk down to Falmouth with a letter to the defendant directing him to follow the clerk's instructions. The clerk accordingly told the captain that he would direct him to go to Plymouth, but it would be under protest. The captain, however, declined to go without a "clean order:" and ultimately (on the 1st of July), the clerk gave him a written order to proceed to Plymouth, and there deliver the cargo; which was done:—

Held, that, upon these facts, the jury were warranted in finding that the defendant had not been guilty of a breach of contract in refusing to go to Copenhagen; and that it was no misdirection for the judge to ask the jury if they thought the captain was under the circumstances justified in pausing until he received further definite orders from the charterers.

THIS was an action for the breach of a charter-party. The declaration set out the charter-party, whereby it was agreed that the ship

Osvetitel should proceed to Havannah, and, after loading there a cargo from the factors of the plaintiffs, should proceed with convenient speed to Cowes or Falmouth for orders, and thence, as ordered, to a safe port within certain limits therein mentioned, and deliver the cargo, on being paid freight as specified, &c.: Averment, that, after the making of the said charter-party, the ship proceeded to Havannah pursuant to the terms of the said charter-party, and that, before the sailing of the said ship from Havannah on her voyage to the United Kingdom, it was agreed between the plaintiffs and the defendant that the said ship should, if so ordered, proceed with the said cargo to certain ports not within the limits mentioned in the said charter-party, to wit, Landscrona or Copenhagen, in consideration of the payment to the defendant of an advanced rate of freight over the rate mentioned in the said charter-party; and that the ship loaded at Havannah a cargo of sugar, and proceeded therewith to Falmouth for orders, and was there duly ordered by the plaintiffs to proceed with the cargo to Copenhagen: General averment of performance by the plaintiff of all *conditions precedent: Breach, that the ship did not nor would proceed with the said [*431 cargo to Copenhagen, or there deliver the same pursuant to the defendant's said agreement, and the defendant then made default in the performance of his said agreement.

The defendant pleaded, amongst other pleas,—thirdly, that he did not make such default as alleged,—fourthly, that, after the said ordering of the said ship to proceed to Copenhagen, and before any default by the defendant in relation thereto, the plaintiff revoked and rescinded the said order, and ordered the said ship to proceed with the said cargo and to deliver the same elsewhere than to or at Copenhagen, to wit, to and at Plymouth,—fifthly, accord and satisfaction. Issue thereon.

The cause was tried before Erle, C. J., and a special jury, at the sittings in London after last Trinity Term, when the following facts appeared in evidence:—The plaintiffs were merchants in London carrying on business under the firm of Van Notten & Co. The defendant was the master of an Austrian vessel called the Osvetitel. The plaintiffs having chartered the Osvetitel for a voyage from Havannah to England, and the vessel being at Havannah on the 30th of April, 1859, by an endorsement on the charter-party it was mutually agreed that the master should proceed thence with the cargo to Landscrona or Copenhagen in consideration of a small advance of freight. The vessel accordingly sailed, and arrived with her cargo at Falmouth on the 18th of June, 1859, and on the next day the plaintiffs were apprised of her arrival by a letter from the defendant, in which he requested them to expedite the orders for his ultimate destination.

On the 28th of June, the plaintiffs sent to Messrs. Fox & Co., shipping agents at Falmouth, a telegram as follows:—"Order the Osvetitel to proceed to *Copenhagen without delay." This was communicated [*432 to the defendant, who on the same day telegraphed to the plaintiffs,—"Cannot proceed to Copenhagen with my ship under Austrian flag." The reason for this was, that, war having at this time broken out between France and Sardinia and Austria, and many French cruisers being known to be out, the defendant conceived he would run great risk of capture if he should attempt to go to Copenhagen. The defendant also on the 29th of June wrote to the plaintiffs, as follows:—

"Falmouth, June 29, 1859.

"Messrs. P. & C. Van Notten & Co., London.

"Gentlemen,—Yesterday at about 4 o'clock, p. m., I received your telegram, by which you order me to proceed with the Osvetitel to Copenhagen, it being my destination. I accordingly answered by wire that I cannot undertake such a transit, owing to the present war, with an Austrian flag, without running imminent risk of being captured by the French cruisers. I do not decline going wherever you may order me, as soon as the navigation is free. If you really want me to proceed to Copenhagen, insure my ship and freight fully, and I shall go at once. It is true that in Havannah I accepted those two clauses, viz. for Copenhagen and Landscrona, on the 30th of April, with an increase of 2*s.* 6*d.* on the rate for Gothenburgh: but at that time nothing was known in Havannah of the war, as the first news reached there on the 14th of May, the very day on which I left.

"Awaiting your ulterior decision, with respects, &c.

"L. CETCOVICH."

On the same day (June 29th), the plaintiffs wrote to the defendant, acknowledging the receipt of his telegram of the 28th, and saying,—"We give you notice that we hold you and your owners answerable to
*433] us *for all loss which may accrue in consequence of your refusal to comply with our orders to proceed with your ship to Copenhagen, where the cargo is to be delivered."

On the 30th of June, the defendant answered that letter, as follows:—

"Falmouth, June 30, 1859.

"Messrs. P. & C. Van Notten & Co., London.

"Gentlemen,—I confirm my letter of yesterday, and am in possession of your valued favour of the same date, from which I observe that you hold me responsible if I do not undertake the transit to Copenhagen according to your respected orders. As already said in last, I do not decline to undertake this voyage; but, as former annoyance compels me not to undertake a transit under the Austrian flag, I shall by no means be responsible to you for the cargo. As soon as the war is ended, I shall proceed to any port that you may order me, that is to say, those mentioned in the charter-party.

"Awaiting your further decision, with due respect, &c.

"L. CETCOVICH."

The plaintiffs, who had contracted for the sale of the cargo at Copenhagen, upon the receipt of the last letter made a conditional contract for the sale and delivery of it at Plymouth, if they failed to induce the defendant to proceed to Copenhagen; and they accordingly sent a clerk named Wiltshire down to Falmouth with a letter to the defendant, as follows:—

"London, June 30, 1859.

"Dear Sir,—We request you to follow the instructions of Mr. A. G. Wiltshire as to your final port of destination.

"P. & C. VAN NOTTEN & Co."

*434] Upon his arrival at Falmouth on the following day, *Wiltshire saw the defendant, and tried to prevail upon him to proceed to

Copenhagen; but the defendant still objecting for the reasons before stated, Wiltshire ultimately told him he would order him to Plymouth, but it would be under protest. To this the defendant objected; and he declined to go to Plymouth without an absolute and unconditional order so to do. Wiltshire thereupon gave the defendant a written order to proceed to Plymouth and there deliver the cargo (sugar), which was sold at a loss. This was done, and the freight paid.

On the part of the plaintiffs, it was insisted that the defendant broke his contract by his refusal on the 28th and 29th of June to proceed to Copenhagen.

His Lordship left it to the jury to say whether the defendant had been guilty of any breach of contract in not proceeding at once to Copenhagen, and whether the plaintiffs' agent Wiltshire had given the defendant a clean order to sail to Plymouth; telling them, that, if they thought that the defendant was justified under the circumstances in pausing until he received further definite orders from the charterers, and that then, and before any breach of the contract, he received from Wiltshire what he was justified in understanding to be a clean order to proceed to Plymouth, the fourth plea would be made out, and the defendant would be entitled to their verdict.

The jury were of opinion that the defendant acted prudently, and was guilty of no breach of contract in staying at Falmouth under the circumstances, and they accordingly returned a verdict for him.

Bovill, on a former day in this term, obtained a rule nisi for a new trial on the ground that the Lord Chief Justice misdirected the jury in not telling them, that, upon the facts and letters proved, there was a breach *of contract by the defendant, and that he ought not to have left to them as a ground of their verdict whether the defendant was justified in pausing and making a stay until he received further definite orders; and also on the ground that the verdict was against evidence. [*435

M. Smith, Q. C., and *Watkin Williams*, now showed cause.—There is no pretence for saying that there was any misdirection; and the finding of the jury was well warranted by the evidence. The time which elapsed between the arrival of the vessel at Falmouth and her being ordered to Plymouth was only two days; and it was properly a question for the jury whether, the war being at its height, and French cruisers in the offing, the master of a vessel under the Austrian flag was not reasonably justified in hesitating to place her in peril of capture. If chased by a French man-of-war, the master of the Osvetitel would clearly have been justified in putting into Plymouth: and, if so, a hesitation or delay of two or three days clearly would not amount to a breach of the charter-party. Avery *v.* Bowden, 6 Ellis & B. 953 (E. C. L. R. vol. 88), was referred to. And see Barrick *v.* Buba, 2 C. B. N. S. 563 (E. C. L. R. vol. 89).

Bovill, Q. C., and *Honyman*, in support of the rule.—The defendant was clearly guilty of a breach of his contract the moment he expressed a determination not to proceed to Copenhagen so long as the danger of capture existed, or until his ship and freight were covered by insurance: and Wiltshire had no authority to waive a breach. The defendant was not justified in imposing any such terms upon the charterers. [BYLES, J.—Was the construction of the defendant's letter of the 30th of June

for the jury or for the court? If for the jury, a misdirection upon that would be rather a misdirection on a matter of fact, which is no ground *436] *for a new trial.] The defendant is told that his refusal to go at once to Copenhagen will be treated as a breach, and he still persists in remaining at Falmouth. The Lord Chief Justice ought to have told the jury, as a matter of law, that the mere apprehension of capture was no justification for the defendant's breach of contract. [BYLES, J.—The master was to proceed with all convenient speed to his destination. Suppose Falmouth had been blockaded, would he have been bound to break the blockade?] That is a question which might present some difficulty. [BYLES, J.—You say the defendant was bound by his contract: Paradine *v.* Jane, Aleyn 26. The question is, whether the defendant was not bound to take all reasonable precautions to render the risk as little as possible.] The risk could not absolve him from the performance of his contract.

BYLES, J.(*a*)—This rule was obtained upon the grounds,—first, that the Lord Chief Justice was wrong in not telling the jury, that, upon the facts and letters proved, the defendant had been guilty of a breach of contract, and that he ought not to have left to them as a ground of their verdict whether the defendant was justified in pausing and making a stay until he received further definite orders; and also on the ground that the verdict was not warranted by the evidence. It was contended at the trial, and again in the argument before us, that the Lord Chief Justice should have told the jury as a matter of law that the defendant had been guilty of a breach of his contract. It seems to me, however, that that is not so, even if it rested upon the construction of the letters. These letters did not constitute the whole case, but were offered as evi- *437] dence of *a breach of contract, in connection with other documents: and, when during the course of the argument the learned counsel for the plaintiffs were asked to say whether the construction of the letters was for the court, they both flinched from the question, as well they might. It clearly was not a question for the court: it was for the jury. The judge ex concessis would have done wrong if he had done as the rule suggests he should have done. The right question clearly was left, namely, was the defendant guilty of a breach of the contract? and the jury found in terms that there was no breach. Then, failing the objection to the substance of the direction, it is said that the learned judge ought not to have left it to the jury to say whether the defendant was justified in pausing and making a stay until he received further definite orders from the plaintiffs. It must be conceded that the merely threatening not to go to Copenhagen would not be a breach of the contract. We had a case in this court not long ago where a mere threat to distrain goods which were not distrainable was held to afford no ground of action.(*b*) A mere discussion on the subject would not be a breach. There must at all events be a delay: and it is not even every delay that would amount to a breach. Suppose at the time the captain received orders to proceed to Copenhagen a violent storm arose, would he not be justified in delaying his departure until the storm abated? Or, suppose a French fleet were outside the harbour, and it was morally certain that the vessel would be captured if she ventured

(*a*) Williams, J., was engaged in the Divorce Court.
(*b*) Beck v. Denbigh, 29 Law J., C. P. 273.

out, the plaintiffs' counsel were constrained to contend that it would be the defendant's duty to go out and deliver himself and his ship and cargo up to the enemy. The plaintiffs were bound to show that there had been unreasonable delay. Now, *what are the facts which show delay? The defendant's refusal to proceed to Copenhagen [*438 is mere matter of inference. In his letter of the 29th of June, the defendant tells the plaintiffs he awaits their ulterior decision. In the plaintiffs' letter of the 29th, which the defendant received on the 30th, they intimate that they will hold him and his owners answerable to them for all loss which might accrue in consequence of his refusal to comply with their orders to proceed to Copenhagen; and on the same day the plaintiffs make a contract for the sale of the sugars at Plymouth, and they send down their clerk with authority to give the defendant directions as to his final port of destination. The clerk accordingly, finding that the defendant still hesitated to place his vessel in danger, tells him he shall direct him to go to Plymouth under protest: but the defendant insists upon having a "clean order" to go; and the jury on this conflict of evidence find that the defendant would not have gone without a clean order,—by which I understand that he objected to go to Plymouth without being indemnified. To Plymouth then he goes. Supposing that the delay thus arising amounted to a breach of the contract, does it lie in the plaintiffs' mouth to say that there was such breach, when they themselves induced the defendant to go to Plymouth with what he must have considered, and what the jury must be assumed to have found he was justified in considering, an absolution from the obligation of going to Copenhagen? Even if there was a refusal by the defendant to go to Copenhagen, I think the case cited of Avery *v.* Bowden, 6 Ellis & B. 953 (E. C. L. R. vol. 88), is a distinct authority in his favour; for, the time not having elapsed within which he was bound to proceed, —that is, a reasonable time,—there was no complete breach. Assuming that the direction of my Lord was altogether erroneous, it was all a question of *fact, and at most the direction would amount to no [*439 more than a mistaken expression of opinion on the part of the judge upon a matter of fact, which is not a subject of complaint. That being so, the first ground of the rule altogether fails. As to the rest, I think the jury came to a correct conclusion; and the Lord Chief Justice has intimated to us that he is not dissatisfied: consequently, there will be no new trial as for a verdict against evidence. Further, I cannot help agreeing with Mr. *Watkin Williams*, that the evidence before us would have proved the fifth plea,—the accord and satisfaction; so that, to send the case down to a fresh trial could be productive of no advantage to the plaintiff.

KEATING, J.—I also am of opinion that this rule should be discharged. I should be sorry to have it supposed, that, in arriving at this conclusion, the court means to qualify in any degree the rule of law that a party contracting to do a thing must do it at all events, or pay the penalty of his inability to perform the contract which he has entered into. It is to be observed that the contract here is not to do an act on a particular day. It is a contract by which the defendant undertook to proceed to Havannah, and there load a cargo from the factors of the plaintiffs, and proceed therewith to Cowes or Falmouth for orders, and thence, as ordered, to a safe port within certain limits,—afterwards altered by a

memorandum endorsed on the charter-party to Landscrona or Copenhagen. The defendant in pursuance of his contract did proceed to Falmouth, and reported his arrival to the plaintiffs, who ordered him to proceed to a port at which, under the then existing state of things, it was very unlikely that he would arrive safely. He according remonstrates by message and by letter, and a discussion ensues between the
*440] parties,—a discussion *which is open, no doubt, to the construction sought to be put upon it by Mr. *Bovill*, but which is also open to the construction that the captain, reasonably remonstrating with the charterers for proposing to send him on a course where capture was imminent, expresses his strong disinclination to incur that risk, but at the same time does not positively refuse to obey the charterers' orders. It seems to be admitted, that, whether or not the conduct of the defendant amounted to a breach of the contract, was a question for the jury; and indeed it could not be denied that it was a question for them: but it is said that the Lord Chief Justice was wrong in leaving it to them to say whether they thought the defendant was justified in pausing for further definite instructions. Whether or not there had been a breach of contract was for the consideration of the jury: and it is extremely difficult for a judge to leave a case to the jury without some such observations as were made here. Now, here was a special jury of London merchants, who must be taken to be perfectly well aware of the rule of law that a man must at all events perform his contract: and they came to the conclusion that this defendant did not absolutely refuse to proceed to Copenhagen. The captain was justified in remonstrating as he did; and the subsequent facts show that he was doing no more. If so, the finding of the jury upon the third plea for the defendant was right. The fourth plea was equally open to their consideration; and they found, as it was perfectly competent to them to find, that the conduct of the plaintiffs did amount to a revocation of the order to go to Copenhagen. As to the other branch of the rule, my Lord is not dissatisfied with the conclusion the jury came to; nor do I see any reason to find fault with it. No doubt, the remarks of Mr. *Bovill* are entitled to great weight:
*441] but it is enough to say that it was reasonably *open to the jury to take a different view. Upon both grounds, therefore, I concur with my Brother Byles in thinking that this rule should be discharged.

Erle, C. J.—I entirely concur in the opinions expressed by my learned Brothers. I think the objection to my direction to the jury could only be sustained upon the supposition that the captain was bound to start on the instant that he received orders from the charterers to proceed to Copenhagen. I do not think that proposition could for a moment be maintained. Suppose a charterer in London, ignorant of the presence of a hostile fleet at the mouth of the harbour, sends a telegram to the master who is awaiting orders, directing him to proceed at once to another port,—if he were uninsured, would he not have serious ground of complaint against the master if he omitted to inform him of the danger his cargo would be exposed to by his instant obedience of the order? Under such circumstances, the captain would have a clear duty to caution the charterer. Here, unquestionably, the defendant received definite instructions to go to Copenhagen. He did not at once obey those instructions, but pointed out to the plaintiffs the risk he would encounter, and asked for farther directions. That, I think, was

no breach of his contract. The plaintiffs then sent down an agent to Falmouth, who ultimately substituted Plymouth as the port of discharge. I think there was nothing unreasonable in asking the jury whether they thought the defendant was under the circumstances justified in pausing as he did: and I think the conclusion the jury came to was quite right. My opinion was, that the contest on the part of the plaintiffs was founded upon an almost wilful perversion of words used by a foreigner. What he said in substance was,—"I do not wish to make my owners liable for a *breach of contract: but pray do consider the risk you are asking me to run." I think the matter was entirely within the province of the jury. I thought Mr. Wiltshire went down to Falmouth with instructions to delude the captain into the belief that his going to Plymouth would be considered a fulfilment of his contract. He had the day before made a protest, which he kept in his pocket. The whole tenor of the evidence, and what passed about the clean order, gave me, I must confess, a feeling that the defendant was thoroughly entitled to a decision in his favour before any tribunal. Rule discharged. [*442

HOTSON v. BROWNE. *Nov.* 24.

The plaintiff,—the proprietor and publisher of certain vehicles for advertisements called "Hotson's Local Time Tables," received from one M. (who was a canvasser for orders on commission) the following memorandum:—"Insert my advertisemants for one year in Hotson's Local Time Tables,—the Great Northern and [six other railways, naming them]. Space to be two squares in back page; and charge for insertion to be 10*s.* in each monthly book. 10*s.* per month each book. T. E. M. 28/6/59. (Signed) B. Browne & Co." The signature and the words "10*s.* per month each book," were in the handwriting of the defendant, and the initials "T. E. M." those of the agent M.

The publication in question consisted of printed copies of the time-bills of the several railways, with various advertisements annexed thereto. M. had not been specifically employed by the plaintiff to procure the order from the defendant; but he was in the habit of collecting orders for advertisements for him, which the plaintiff adopted if he approved of them. The defendants' advertisements were accordingly inserted each month in each of the seven time-tables, and this action was brought for this agreed price.

The defence being that the defendant was induced to sign the contract by the misrepresentation of M. at the time that the charge was to be 10*s.* per month for the seven books,—it was proposed at the trial to ask the defendant, who was called as a witness, what representations M. had made to him when he obtained the order from him; but the judge declined to allow the question to be put, inasmuch as it was an attempt to vary by parol a written contract:—

Held, that the defendant's proposal being in terms adopted by the plaintiff, the evidence was properly rejected.

Held also, that, assuming M. to have been the plaintiff's agent in the transaction, evidence of what passed between him and the defendant at the time of giving the order would have been admissible if the issue between the parties had been whether the defendant had been induced to sign the memorandum by fraud.

THIS was an action brought by the plaintiff, the proprietor and publisher of certain railway time-tables called "Hotson's Local Time-Tables," to recover a sum *of 42*l.* The particulars of demand annexed to the summons were as follows:— [*443

"1859 and 1860. For the insertion of defendant's advertisements in Hotson's Great Northern Time-Table [and six other railway time-tables named] for the months of July, August, September, October, November, and December in 1859, and in the months of January, Febru-

ary, March, April, May, and June in 1860, at 10*s.* per month each book, for the seven books, as per order."

The cause was tried before the judge of the sheriff's court, London. The judge's notes of what passed at the trial were as follows:—

"Publication of the advertisements in the seven books of the plaintiff for the twelve months, admitted. Signature of the written order also admitted. The order signed by the defendant was in the words and figures following:—

"'Insert my advertisements for one year in Hotson's local time-tables,—the Great Northern [and six others, naming them]: space to be two squares in back page, and charge per insertion to be 10*s.* in each monthly book.

"'Ten shillings per month each book.'

"'T. E. M. 28/6/59.' "'B. BROWNE & Co.'

"The words 'Ten shillings per month each book' in the order were in the handwriting of one of the defendants, and the initials 'T. E. M.' the initials of one T. E. Miller, referred to in the evidence.

"The plaintiff was put in the box, and on cross-examination said, 'I do not employ agents. I allow a commission on advertisements brought, varying from 5*l.* to 15*l.* per cent. on advertisements such as I approve of. I have received twenty-four orders through Mr. Miller. I refused
*444] a great number of Miller's orders. *He carries on the business of a canvasser. After the three months, the defendant said 'Call next Saturday and I will pay you.' I had no arrangement with Miller more than with any other person who collected advertisements for me. I never took an order except in writing. When the orders were brought we discussed the commission. He (Miller) came to me first and offered me advertisements. I said to him, 'If you have any good advertisements, and bring them to me, and if I approve of them after inquiry, and I insert them, I shall give you a commission.' This particular advertisement came through Miller, and I paid him a commission, after making inquiries.' This was the plaintiff's case.

"The defendant was called, and said,—'Miller called upon me in June last year. He called frequently, and asked me to advertise in Hotson's Time-Tables.' Question,—'What representation did Miller make to induce you to enter into the written contract?' Objected, inadmissible,—firstly, Miller not being agent of Hotson,—secondly, attempt to vary written document.

"Memorandum,—the representation alleged being that the 10*s.* was 10*s.* per month for the whole seven books, and not 10*s.* per month for each of the seven books.

"Evidence rejected as inadmissible.

"Asked to be left to the jury. Refused.

"The judge adopted the interpretation of the written order put upon it by the plaintiff, and thereupon directed a verdict for the amount claimed by him. If the judge was wrong in so doing, as contended by the defendant, a new trial is to be had; if otherwise, the judgment is to be affirmed."

*445] *Joyce*, on a former day, obtained a rule nisi for a *new trial on the ground of misdirection, and that the evidence of what

passed between Miller and the defendant at the time the order was given was improperly rejected.

Laxton showed cause.—The written contract is ambiguous on the face of it; and therefore evidence of what was said by the plaintiff's agent at the time was receivable and ought to have been admitted, as forming part of the contract. It is plain that the defendant was induced to give the order by the fraudulent statement of Miller. The whole contract was not in writing. The order is in writing, the acceptance oral; it was for the jury, therefore, to say what the contract between the parties was. If there was fraud, the evidence was admissible; and whether fraud or not was properly a question for the jury. In Dobell *v.* Stevens, 3 B. & C. 623 (E. C. L. R. vol. 10), 5 D. & R. 490 (E. C. L. R. vol. 16), where the vendor of a public-house made pending the treaty certain deceitful representations respecting the amount of the business done in the house, and the rent received for a part of the premises, whereby the plaintiff was induced to give a large sum for the premises,—it was held that the latter might maintain an action on the case for the deceitful representations, although they were not noticed in the conveyance of the premises, or in a written memorandum of the bargain, which was drawn up after these representations were made. [BYLES, J.—Contemporaneous fraudulent statements avoid the contract: but, unless fraud be shown the contemporaneous statements by parol are not admissible.] If the whole contract had been in writing, undoubtedly it would not have been competent to the defendant to offer parol evidence to vary it, unless fraud were shown. But, where part of the contract is in writing, and part oral, the whole is for the jury.

**Joyce*, in support of the rule.—The defendant having had all the benefit he could derive from the contract, it is not competent [*446 to him now to raise this objection. In Clarke *v.* Dickson, 1 Ellis, B. & E. 148 (E. C. L. R. vol. 96), it was held that a person induced by fraud to enter into a contract under which he pays money, may, at his option, rescind the contract, and recover back the price as money had and received, if he can return what he has received under it: but, when he can no longer place the other party in statu quo, as if he has become unable to return what he has received in the same plight as that in which he received it, the right to rescind no longer exists; and his remedy must be by an action for deceit, and not for money had and received. So, here, the defendant, if deceived, may have a remedy by cross-action. Besides, if he had intended to present this as a case of fraud, he should have done so at the trial. [ERLE, C. J.—If the act were clearly fraudulent, there was no need to *call* it fraud. But I must confess I see no indication of fraud in the case: and, counsel not agreeing, we must take the case as it stands. The question is whether this was not within the province of the jury to determine. According to the plaintiff's evidence, Miller had authority to get proposals for contracts, subject to the plaintiff's approval when brought to him. Accordingly, Miller gets the defendant to sign a proposal, and takes it to the plaintiff. It becomes a contract by the combination of the written proposal and the oral acceptance. The whole must be for the jury.] The entire contract, it is submitted, is the writing. [ERLE, C. J.—If Browne had been plaintiff, as the contract, as you call it, was not signed by Hotson, you must have proved by oral evidence, that Hotson assented to it.

BYLES, J.—There was strong evidence to show that Miller was the *447] plaintiff's agent.] If so, the contract was complete at the *time, and all in writing. An ordinary building contract is usually signed by the builder only. If Miller was not the plaintiff's agent, there was a contract signed by the defendant, and all the plaintiff had to do was to perform the work. If Miller was the plaintiff's agent, then the plaintiff was bound by his acts and representations.

Cur. adv. vult.

ERLE, C. J.—This was a rule for a new trial on the ground of a misdirection in point of law, or the refusal to receive evidence which ought to have been admitted. The action was brought upon a contract, signed by the defendant, to pay a given sum for the insertion of certain advertisements in a publication called Hotson's Local Time-Tables. We consider the point which is referred for our decision to be, whether evidence of a conversation which is alleged to have taken place at the time the contract was entered into, was admissible to vary the effect of the promise the defendant signed. It was contended before us that the defendant was induced to enter into the contract by the fraud of the plaintiff's agent. If that had been the issue, we see no reason for doubting that the evidence tendered would have been admissible. But, as the learned counsel for the plaintiff denies that that was the issue, and the judge's notes throw no light upon it, we are of opinion that the question of fraud is not properly before us. Then, it was contended that the evidence was admissible on the ground that the construction of the contract was for the jury. We think not. We think, that, if the promise was adopted in terms by the plaintiff, the evidence offered of contemporaneous conversation to vary the effect of the promise was not admissible or proper for the consideration of the jury. We there- *448] fore think the judge was *right in ruling as he did, and consequently that the rule for a new trial must be discharged.

Under the circumstances, however, we think there should be no costs.

Rule discharged without costs.

COCHRANE v. GREEN. *Nov.* 26.

The plaintiff having claims against the defendant for the enforcement of which he had instituted a suit in Chancery, it was agreed, that, in consideration that the plaintiff would forbear to prosecute the suit and abandon the same and his claims, the defendant promised that he would, *out of the first moneys* he might receive from W. in respect of his claims upon him arising out of the B. railway contract, hand to the plaintiff the sum of 500*l.*, and, *out of any further moneys* he might receive from W. in respect of the same contract, 10*l.* per cent. upon the net amount which he might so from time to time receive, until such per centage to the plaintiff should amount to 1300*l.*, when all further payments by the defendant were to cease,—it being understood and agreed that the defendant would not compromise with W. without providing for the plaintiff the above-mentioned 1300*l.*, or so much of it as might remain due to him according to his promise.

One payment only (of 2000*l.*) having been made to the defendant by W. in respect of his claims arising out of the B. railway contract:—Held, that the plaintiff was only entitled to the 500*l.* thereout, and not to 10*l.* per cent. on the residue thereof.

In an action to recover the 500*l.*, the defendant pleaded, as to 339*l.*, that, before the commencement of the suit, the plaintiff was indebted to one S. S. in the sum of 339*l.*; that the defendant, at the request of the plaintiff, agreed with S. S. to pay him the 339*l.*, and S. S. agreed to accept the defendant as his debtor instead of the plaintiff for that sum; and that the

defendant was still liable to pay the same to S. S.:—Held, no answer to the plaintiff's claim, inasmuch as the plea did not show that the plaintiff's liability to S. S. was discharged.

Where A. has a money demand against B., and B. (*though a trustee*) has a money demand against A. which but for the intervention of the trust would have constituted a good legal set-off against A.'s demand, the latter may be pleaded by way of *equitable* set-off.

THE first count of the declaration stated that theretofore, to wit, on the 5th of March, 1858, the plaintiff had certain valid and bonâ fide claims and demands against the defendant, and had, in order to enforce payment and satisfaction thereof, instituted a suit in the High Court of Chancery against the defendant; and thereupon, to wit, on the day and year aforesaid, in consideration that the plaintiff would at the defendant's request forbear to prosecute the said suit, and abandon the same and his aforesaid claims and demands, the defendant promised the plaintiff that he the defendant would out of the first moneys he might receive from Mr. Watson, of Parliament Street, in respect *of his the [*449
defendant's claim upon him the said Mr. Watson, arising out of the Bahia railway contract, hand to the plaintiff the sum of 500*l.*, and out of any further moneys he might receive from the said Mr. Watson in respect of the same contract 10 per cent. upon the net amount which he might so from time to time receive, until such percentage to the plaintiff should amount to the sum of 1300*l.*, when all further payments by the defendant were to cease; it being understood and agreed between the plaintiff and the defendant that the defendant would not compromise with the said Mr. Watson without providing for the plaintiff the above-mentioned 1300*l.*, or so much of it as might remain due to him according to his promise: Averment, that the plaintiff did accordingly forbear to prosecute the said suit, and did abandon the same and his aforesaid claims and demands; and that all conditions precedent, matters, and things requiring to have been performed and to have happened and existed to entitle the plaintiff to the full performance of the said contract by the defendant, and to maintain his action for the non-performance thereof as thereinafter mentioned, were performed and did happen and exist before the commencement of this suit; yet the defendant to keep his said promise wholly failed, and had not at any time paid the said sum of 500*l.* or any part thereof, or the said sum of 10*l.* per cent., or any part thereof.

There was a second count, for money payable by the defendant to the plaintiff for work done by the plaintiff for the defendant at his request, and for money received by the defendant to the use of the plaintiff, and for money found to be due from the defendant to the plaintiff upon accounts stated between them.

First plea,—as to the first count, except so far as the same related to the sum of 500*l.* therein mentioned,—*that the defendant re- [*450
ceived from the said Mr. Watson no moneys whatever in respect of the Bahia railway contract over and above a certain sum paid in one payment, that is to say, 2000*l.*, and out of which the plaintiff became entitled to the said sum of 500*l.* and no more.

Demurrer, on the ground "that the plea on the face of it shows that more than 500*l.* was received by the defendant, within the meaning of the agreement in the first count."

Fifth plea,—as to so much of the declaration as related to the sum of 407*l.* 4*s.*, parcel of the said sum of 500*l.* therein mentioned,—by way

of defence on equitable grounds, that the plaintiff, before the commencement of this suit, by his promissory note promised to pay certain persons trading under the name, style, and firm of John Eldred & Co., or their order, on demand, the sum of 250*l.*; and the said persons, before the commencement of this suit, endorsed the said note to the defendant for a good, valuable, and sufficient consideration, who then became and was the lawful holder thereof and entitled to receive and recover from the plaintiff the full amount of the said note, but the plaintiff never paid or satisfied the amount of the said note or any part thereof: that the plaintiff, before the commencement of this suit, by his other promissory note promised to pay the said last-mentioned persons, or their order, on demand, the sum of 157*l.* 4*s.* and the said persons, before the commencement of this suit, endorsed the said last-mentioned note to the defendant for a good, valuable, and sufficient consideration, who then became and was the lawful holder thereof and entitled to receive and recover from the plaintiff the full amount of the said last-mentioned note, but the plaintiff never paid or satisfied the same or any part thereof: *that afterwards, and whilst the defendant continued and was such lawful owner of the said notes and entitled to receive the proceeds thereof and payment of the same, he the defendant handed over and delivered the said note to one Archibald Dunlop as the trustee and agent of the defendant, and for his the defendant's sole use and benefit, and without any value or consideration whatever, to the intent and on the express terms and agreement that he the said Archibald Dunlop should take, receive, and hold them as such trustee and agent as aforesaid, and should sue the plaintiff upon them on behalf of the defendant, to recover the amount of the said notes, and should pay over the proceeds thereof to the defendant: that the said Archibald Dunlop always held the said notes on the said terms as such trustee and agent, and not otherwise, and that there was never at any time any value or consideration for his holding the said notes, except as aforesaid, but that, from the time of the said endorsements to the defendant, he the defendant was always entitled to receive the proceeds of the same: that, afterwards, and in pursuance of the said agreement, and at the request of the defendant, the said Archibald Dunlop, as such trustee and agent as aforesaid, sued the plaintiff in the Court of Common Pleas to recover the amount of the said notes; and such proceedings were thereupon had, that, by the consideration and judgment of the said court, the said Archibald Dunlop recovered against the now plaintiff in the said action a certain sum, to wit, 444*l.* 16*s.*, being the full amount of the said promissory notes, and also a certain other sum, to wit, 30*l.* 1*s.* 2*d.*, for his costs about his suit in that behalf expended, which said judgment still remained in full force, unrecovered and unsatisfied: that the said judgment was obtained at the defendant's sole expense and cost, and that he *always was and still is equitably and beneficially entitled to the same, and to the proceeds thereof, and the said Archibald Dunlop never at any time had or now has any equitable or beneficial interest therein, but was entitled only as such trustee and agent as aforesaid on behalf of the defendant; and the defendant claimed equitably to set off the amount of the said notes recovered under the said judgment against the said sum of 407*l.* 4*s.*, parcel, &c., in the introductory part of this plea men-

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tioned, and to which this plea was pleaded, and that the said sums were equal in amount.

Demurrer, on the ground "that the sum sought to be set off is not one capable of being set off in equity."

The sixth plea, to the last count, was similar to the fifth plea, and there was a demurrer thereto on the same ground.

Seventh plea,—as to so much of the first count of the declaration as related to the sum of 339*l.*, parcel of the said sum of 500*l.* therein mentioned, and also as to the plaintiff's claim in respect of the causes of action in the last count of the declaration mentioned,—that, before the commencement of the suit, the plaintiff was indebted to one Samuel Smith in the sum of 339*l.*, and the defendant, before the commencement of the suit, at the request of the plaintiff, agreed with the said Samuel Smith to pay him the said Samuel Smith the said sum of 339*l.*, and the said Samuel Smith agreed to accept the defendant as his debtor instead of the plaintiff for the said sum of 339*l.*, and the defendant was still liable to pay the same to the said Samuel Smith, whereby the plaintiff's right to recover the said sum of 339*l.* was and is wholly lost and extinguished.

Demurrer, on the ground "that the seventh plea sets up a mere collateral independent agreement not in any way connected with or relating to the causes of action to which the seventh plea is pleaded."

*Eighth plea,—as to so much of the first count of the declaration as related to the sum of 114*l.* 9*s.* 5*d.*, parcel of the said sum of 500*l.* therein mentioned, and also as to the plaintiff's claim in respect of the causes of action in the last count mentioned,—that, before the commencement of the suit, the plaintiff was indebted to one Alfred Moore in the sum of 114*l.* 9*s.* 5*d.*, and the defendant, before the commencement of the suit, at the request of the plaintiff, agreed with the said Alfred Moore to pay him the said Alfred Moore the said sum of 114*l.* 9*s.* 5*d.*, and the said Alfred Moore agreed to accept the defendant as his debtor instead of the plaintiff for the said sum of 114*l.* 9*s.* 5*d.*, and that the defendant was still liable to pay the same to the said Alfred Moore, whereby the plaintiff's right to recover the said sum of 114*l.* 9*s.* 5*d.* was and is wholly lost and extinguished. [*453

Demurrer, on the same ground as the demurrer to the seventh plea.

J. Brown (with whom was *Hawkins*, Q. C.), in support of the demurrers.(*a*)—The first question which *arises is as to the construction to be put upon the contract declared on in the first count,— [*454

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

As to the first plea,—"That it is bad, inasmuch as it assumes, that, upon the true construction of the agreement declared upon in the first count, the defendant, on receiving from Watson in one payment a sum exceeding 500*l.*, was only bound to pay to the plaintiff the amount of 500*l.*, and not the additional percentage stipulated to be paid by the agreement; whereas, the plaintiff will insist, that, upon the true construction of the agreement, the defendant was bound to pay to the plaintiff the percentage out of all moneys received by the defendant from Watson exceeding the amount of 500*l.*, whether received in one payment or in several payments."

As to the fifth plea,—"That that plea is bad, because it discloses no cross equitable debt whatever, or, if any, none which is the subject of equitable set-off; and also because the alleged equitable set-off is not shown to have arisen out of, or to have been in any way connected with, the plaintiff's legal debt, but appears to have been wholly distinct therefrom and collateral thereto; and also because a court would not restrain by injunction an action brought to recover a legal debt, on the ground of the existence of a cross equitable debt, without some other and further equity entitling to a decree for an account or other relief, which the plea does

whether the plaintiff was entitled to 500*l.* only out of the 2000*l.* received from Watson, or to 500*l.* and 10 per cent. on anything beyond that sum
*455] which might be obtained. *The contention on the part of the defendant is, that the 10 per cent. is to be chargeable upon the subsequent payments only. The plaintiff, however, submits that, though not very clearly expressed, the agreement is that the 500*l.* is to be part of the 1300*l.*, and is a sum to be paid by way of anticipation of the 10 per cent. The fifth and sixth pleas are also bad. They disclose no cross equitable debts, or, at all events, none which are properly the subject of equitable set-off. To constitute a good equitable set-off, there must be some connection between the two demands, or the defendant must have been induced to give credit to the plaintiff in consequence of his debt to him. In Rawson *v.* Samuel, 1 Cr. & Ph. 161, it was held that equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand: the mere existence of cross-demands is not sufficient. Lord Cottenham, C., there says: "We speak familiarly of equitable set-
*456] off as distinguished from the set-off at *law; but it will be found that this equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross-demands is not sufficient: Whyte *v.* O'Brien, 1 Sim. & St. 551; although it is difficult to find any other ground for the order in William *v.* Davies, 2 Sim. 461, as reported. In the present case, there are not even cross-demands, as it cannot be assumed that the balance of the account will be found to be in favour of the defendants at law. Is there, then, any equity in preventing a party who has recovered damages at law from receiving them, because he may be found to be indebted, upon the balance

not disclose; and also because a court of equity would not by reason of a cross equitable debt restrain an action for a legal debt absolutely or perpetually, and that, if such an action should be restrained at all by a court of equity, it would also take the accounts between the parties."

As to the sixth plea,—The same as the fifth, with this addition, "that the sixth plea is bad, because it is not averred therein, nor does it appear thereby, that the amount of the alleged equitable set-off equals the amount of the legal debt to which the sixth plea in its introduction purports to be pleaded."

As to the seventh plea,—"That it is bad, because it sets up a mere collateral independent agreement not in any way connected with or relating to the causes of action to which the seventh plea is pleaded, as an answer to those causes of action, which it could not be in point of law; and also that it is bad, because it does not in any way appear therefrom that it was agreed between the defendant and the plaintiff and the said Samuel Smith, or between the plaintiff and the defendant, or between the plaintiff and the said Samuel Smith, that the defendant should become the debtor of the said Samuel Smith instead of the plaintiff, nor that upon and by the defendant becoming instead of the plaintiff the debtor of the said Samuel Smith, the debt due from the defendant to the plaintiff to which the seventh plea is pleaded should be satisfied or extinguished, nor that the debt due from the defendant to the plaintiff and that due from the plaintiff to the said Samuel Smith should be exchanged; nor does the seventh plea show any merger, satisfaction, or extinguishment whatever of the debt to which the seventh plea is pleaded: and that the seventh plea is also bad, because in its introduction it purports to be pleaded not only to so much of the first count as relates to the sum of 339*l.*, parcel of the sum of 500*l.* therein mentioned, but also to the last count, whereas the plea does not answer the whole of the causes of action to which in its introduction it so purports to be pleaded, inasmuch as it merely answers a debt due to the plaintiff of 339*l.*, without its appearing in any way from the plea that the moneys claimed in the last count, or any part thereof, are identical with or included in the sum of 339*l.*, parcel of the sum of 500*l.* in the first count mentioned, or any part thereof."

As to the eighth plea,—The same as the seventh, substituting the name of Alfred Moore for that of Samuel Smith, and the sum of 114*l.* 9*s.* 5*d.* for 339*l.*

of an unsettled account, to the party against whom the damages have been recovered? Suppose the balance should be found to be due to the plaintiff at law, what compensation can be made to him for the injury he must have sustained by the delay? The jury assess the damages as the compensation due at the time of their verdict. Their verdict may be no compensation for the additional injury which the delay in payment may occasion. What equity have the plaintiffs in the suit for an account to be protected against the damages awarded against them? If they have no such equity, there can be no good ground for the injunction." That is confirmed by Fisher *v.* Baldwin, 11 Hare 352, where a *quære* is suggested, whether equitable set-off is not confined to cases in which the equity of the bill impeaches the title to the legal demand. [BYLES, J.—This is not, and never was a legal debt.] The rule is thus laid down in Story's Equity Jurisprudence, § 1435,—"It would seem, that, independently of the statutes of set-off, courts of equity, in virtue of their general jurisdiction, are accustomed to grant relief in all cases where, although there are mutual and independent debts, yet *there [*457 is a mutual credit between the parties, founded at the time upon the existence of some debts due by the crediting party to the other. By mutual credit, in the sense in which the terms are here used, we are to understand a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on and trusting to such debt as a means of discharging it. Thus, for example, if A. should be indebted to B. in the sum of 10,000*l.* on bond, and B. should borrow of A. 2000*l.* on his own bond, the bonds being payable at different times, the nature of the transaction would lead to the presumption that there was a mutual credit between the parties as to the 2000*l.* as an ultimate set-off pro tanto from the debt of 10,000*l.* But, if the bonds were both payable at the same time, the presumption of such a mutual credit would be converted almost into an absolute certainty. Now, in such a case, a court of law could not set off these independent debts against each other. But a court of equity would not hesitate to do so, upon the ground, either of the presumed intention of the parties, or of what is called a natural equity. If, in such a case, there should be an express agreement to set off the debts against each other pro tanto, there could be no doubt that a court of equity would enforce a specific performance of the agreement, although, at the common law, the party might be remediless." "In the next place (§ 1436), as to equitable debts, or a legal debt on one side and an equitable debt on the other, there is great reason to believe, that, whenever there is a mutual credit between the parties touching such debts, a set-off is upon that ground alone maintainable in equity; although the mere existence of mutual debts, without such a mutual credit, might not even in a case of insolvency sustain it. But the mere existence of cross-demands will not be sufficient to [*458 *justify a set-off in equity. Indeed, a set-off is ordinarily allowed in equity only when the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand,—the mere existence of cross-demands is not sufficient. A fortiori, a court of equity will not interfere, on the ground of an equitable set-off, to prevent the party from recovering a sum awarded to him for damages for a breach of contract, merely because there is an unsettled account between him and the other party in respect to dealings arising out of

the same contract." In the note to that section, the learned editor (edit. 6) says: "In Green v. Dorling, 5 Mason R. 212, the court, after citing the principal decisions, summed up the result in the following language: 'The conclusion which seems deducible from the general current of the English decisions (although most of them have arisen in bankruptcy) is, that courts of equity will set off distinct debts, where there has been a mutual credit, upon the principles of natural justice, to avoid circuity of suits, following the doctrine of compensation of the civil law to a limited extent. That law went further than ours, deeming each debt suo jure set off or extinguished pro tanto; whereas, our law gives the party an election to set off if he chooses to exercise it. But, if he does not, the debt is left in full force, to be recovered in an adversary suit. Since the statutes of set-off of mutual debts and credits, courts of equity have generally followed the course adopted in the construction of the statutes by courts of law, and have applied the doctrine to equitable debts. They have rarely if ever broken in upon the decisions at law, unless some other equity intervened which justified them in granting relief beyond the rules of law, such as has been already alluded to. And, on the other hand, courts of law sometimes set off equitable against legal debts, *459] *as in Bottomley v. Brooke, cited 1 T. R. 619. The American courts have generally adopted the same principles, as far as the statutes of set-off of the respective states have enabled them to act.' The court adhered to the same doctrine in Howe v. Sheppard, 2 Sumner, R. 409, 414, 416, and Gordon v. Lewis, 2 Sumner, R. 628, 633, 634." [WILLIAMS, J., referred to Jones v. Mossop, 3 Hare 568. There, A. was indebted on bond to B.: B. died, leaving C. his sole next of kin, who obtained letters of administration of his estate. The estate of B., after all debts, &c., were paid, left a clear residue exceeding the amount of the bond debt. A. became surety for C. by joining in promissory notes. C. became an insolvent debtor, and A. was compelled to pay the notes. C. died, and then the assignee under his insolvency took out letters of administration de bonis non of B., and sued A. on the bond: and it was held that A. might set off the sums which he had been compelled to pay as surety for C. against the bond debt. BYLES, J., referred to Freeman v. Lomas, 9 Hare 109. It was there held that cross-demands existing in separate rights are not in equity (except under special circumstances) allowed to be set off one against the other; and therefore an executor and trustee of a legacy, who was also the residuary legatee, and had become a creditor of the husband and administrator of a deceased legatee, was not, in the absence of any special agreement, allowed to set off his debt against the legacy to which the husband (having survived his wife, the legatee) was, as such administrator, entitled.] Clark v. Cort, Craig & Ph. 154, will be relied on for the other side. It was there held, that, where there are cross-demands between two parties of such a nature, that, if both were recoverable at law, they would be the subject of legal set-off, then, if either of the demands is *460] matter of equitable jurisdiction, the *set-off will be enforced in equity. [BYLES, J.—That is much nearer the point than any case you have yet cited.] The ground upon which it is put by the Lord Chancellor, it is submitted, distinguishes it from the present case. "The deed of 1837," he says, "provided for the past and future trans-

actions and dealings of Groocock and Mansfield & Co.; and it provided that it should enure as a security to whomsoever should carry on the business of Mansfield & Co., for the payment of all moneys due in respect of such transactions. The plaintiffs are now the persons filling that situation; they are therefore not merely assignees of a legal debt without the privity of the debtor, but they are assignees of the debt for whom the debtor contracted that the security should enure. The property has been sold, and the amount of the debt, the result of the transactions and dealings, is admitted to be unascertained. The plaintiffs therefore are, as assignees of this debt, and by contract, entitled to what is so due, and to the application of the proceeds of the property in part payment. The case, then, is not that of a mere assignee of a legal debt coming into equity to have the benefit of a set-off which he could not have at law." [BYLES, J.—The latter part of the judgment in Freeman *v.* Lomas is in your favour. The Vice-Chancellor assumes it to be an established principle, that "where one demand is equitable and the other legal, there is set-off in equity, if there would be set-off at law, had both the demands been legal."] Then, the seventh and eighth pleas are also bad. There is no merger or extinguishment of the debt. The three parties are not brought together. If the defendant had paid Smith (or Moore), it might have done; but, without actual payment, or at least an agreement to discharge the plaintiff from his original debt, it discloses no defence. In 1 Wms. Saund. 210 *a* (notes to Forth *v.* Stanton), it is said: "There is an exception to the general [*461 rule of law, that a chose in action cannot be assigned, viz., that, where there is a debt due from A. to B., and a debt to the same or a larger amount due from C. to A., and the three agree that C. shall be B.'s debtor instead of A., and C. promises to pay B., the latter may maintain an action against C.: Wilso *v.* Coupland, 5 B. & Ald. 228; Hodgson *v.* Anderson, 3 B. & C. 842 (E. C. L. R. vol. 10), 5 D. & R. 735 (E. C. L. R. vol. 16); Fairlie *v.* Denton, 8 B. & C. 395, 2 M. & R. 353. But it is a necessary ingredient to this exception, that the original debt from A. to B. should be extinguished; for, B. cannot sue C., if he retains the right to sue A.: Cuxon *v.* Chadley, 3 B. & C. 591, 5 D. & R. 417; Wharton *v.* Walker, 4 B. & C. 163 (E. C. L. R. vol. 10), 6 D. & R. 288." That necessary ingredient is altogether wanting here: there is nothing on the face of the plea to show that the plaintiff intended to discharge the defendant till he paid Smith. In Thomas *v.* Shillibeer, 1 M. & W. 124,† in assumpsit against two defendants, S. and M., for money had and received, the defendants pleaded, as to 25*l.*, parcel, &c., that on, &c., they were carrying on business in partnership, and employing many servants; that, while they were such partners, the plaintiff deposited with them as such partners the said sum of 25*l.*, as a security for his faithfully accounting for all moneys received by him as their servant, to be repaid to him on quitting their employ; that they dissolved partnership, and it was thereupon agreed between them that the defendant S. should take upon himself the payment of part of the debts, and retain in his employ certain of the servants; and that the defendant M. should take upon himself the payment of other debts, and retain in his employ others of the servants; and that, in pursuance of such agreement, M. took upon himself the payment of the 25*l.* to the

*462] plaintiff, and retained the plaintiff in his *sole employ; and that the plaintiff had notice of all the premises, and assented to such agreement and retainer by M., and in consideration thereof discharged S. from his promise as to the 25*l*. The plaintiff replied that M. did not retain him in his sole employ, nor did the plaintiff assent to such agreement and retainer, or discharge the defendant, &c. And it was held, after verdict for the defendant on this issue, that the plaintiff was entitled to judgment non obstante veredicto, on the ground that no contract was shown which made M. solely liable to the plaintiff. In the course of the argument, it was urged by Barstow, for the defendants, that "the legal meaning of the agreement stated in the plea, is, an agreement by M. to pay the plaintiff:" whereupon Parke, B., observes, —"It must be an agreement with the plaintiff," and, upon its being urged that the facts amounted to this, "that both parties come to the plaintiff, and state an arrangement between them, and he assents to it," the learned Baron adds,—"The difficulty is, you have not got them all together on the face of your plea." That is precisely the defect here.

Lush, Q. C. (with whom was *Giffard*), contrà.(*a*)—The effect of the *463] agreement is, to entitle the plaintiff to *500*l*. out of the first money paid by Watson, and to 10*l*. per cent. upon all *subsequent* payments until the whole should amount to 1300*l*. The word "further" applies not to amount, but to the future payments to be made by Watson on account of the Bahia railway contract. Then, as to the fifth and sixth pleas, which claim a right of equitable set-off,—the cases cited on the other side have no application. In Rawson *v.* Samuel, 1 Cr. & Ph. 161, there was no ascertained debt due to the defendant until the account was taken, and then and not till then it would become a legal debt. Clark *v.* Cort, 1 Cr. & Ph. 154, however, is identical with the present case. There, the plaintiffs were assignees of a simple contract debt; and Lord Cottenham says,—"The deed of 1837 provided for the past and future transactions and dealings of Groocock and Mansfield & Co.; and it provided that it should enure as a security to whomsoever should carry on the business of Mansfield & Co., for the payment of all moneys due in respect of such transactions. The plaintiffs are now the persons filling that situation: they are therefore not merely assignees of a legal debt without the privity of the debtor, but they are assignees of the debt for whom the debtor contracted that the security should enure. The property has been sold, and the amount of the debt, the result of the transactions and dealings, is admitted to be unascertained. The plaintiffs therefore are, as assignees of this debt, and by contract, entitled to what is so due, and to the application of the proceeds of the property in part payment. The case, then, is not that of a mere assignee of a legal debt coming into equity to have benefit of a set-off which he could not have at law. As equity recognises the assignee of a debt as the

(*a*) The points marked for argument on the part of the defendant were as follows:—

Upon the demurrer to the first plea,—"That, upon the true construction of the agreement declared on, only 500*l*. became payable to the plaintiff out of the first moneys defendant might receive from Watson, whatever the amount of such moneys."

Upon the demurrers to the fifth and sixth pleas,—"That the sum sought to be set off constitutes a good set-off in equity."

Upon the demurrers to the seventh and eighth pleas,—"That the plea discloses an extinguishment of the causes of action to which it is pleaded."

creditor, and as these demands, if both were recoverable at law, would be the subject of set-off, so, if equity has jurisdiction of the subject-matter, it *will enforce the set-off." Story's Equity Jurisprudence supports that doctrine. Where the one claim is legal and the other [*464 equitable, equity follows the law, and allows the set-off. In Whyte *v.* O'Brien, 1 Sim. & Stu. 551, the claim could not have been set off at law. Fisher *v.* Baldwin, 11 Hare 352, is substantially the same as Rawson *v.* Samuel. No set-off is allowed in equity in respect of legal demands, although there cannot be a set-off at law, the demands being in autre droit: Harvey *v.* Wood, 5 Madd. 459. The seventh and eighth pleas are clearly good. No principle of law can be more clear than this, that, if my creditor agrees with me to pledge my credit and responsibility for his debt to a third person, and that third person accepts my liability, I am discharged from responsibility to my original creditor. The plea here states that the defendant, at the plaintiff's request, agreed with Smith to pay him the plaintiff's debt. [WILLIAMS, J.—You must make all three parties to the agreement. There is no allegation here of any communication between Smith and the plaintiff.] It is submitted that that does sufficiently appear. Hart *v.* Alexander, 2 M. & W. 484,† is precisely in point. There, the plaintiff, an officer serving in the King's forces in India, in 1815 deposited money with A., B., C., and D., bankers in Calcutta, trading under the firm of A. & Co. In 1818, A. came to England, having executed a deed whereby he was to cease to be a partner in the firm in 1822, and E. was to be admitted a partner in his room. In 1822, A. accordingly retired from, and E. came into the partnership, and the dissolution was announced in the Calcutta Gazette. It appeared to be the practice of the firm to give notice of changes of partnership to their customers by circular letters: there was, however, no proof that any letter reached the plaintiff announcing A.'s retirement. In 1822, A. become a candidate *for a seat in the [*465 direction of the East India Company, and repeatedly published an address to the proprietors of East India Stock, in several newspapers, stating that his connection with mercantile concerns in India had ceased. Two of these newspapers were taken in at the reading-room of a town where the plaintiff, who had returned to England, was there resident. The accounts current of A. & Co. were transmitted yearly to the plaintiff from 1817 to 1832, and the rates of interest allowed on them varied several times after the year 1822. In 1831, the plaintiff executed a power of attorney to the then members of the firm of A. & Co., to collect the effects of a testator in India. In 1832, A. & Co. failed. In 1832, the plaintiff executed another power of attorney to C. (who also had then retired from the firm) to prove debts against the estate of the bankrupts (naming them, and describing them as carrying on business under the firm of A. & Co.), and to receive dividends. And it was held that these facts constituted sufficient evidence to go to the jury to show that the plaintiff knew that A. had retired from the firm and E. had come in in his place; and that he had agreed to discharge A. from liability, and take the new firm as his debtors. [BYLES, J.—There, there was evidence of an agreement between all the three parties.] So there is here. In Thompson *v.* Percival, 5 B. & Ad. 925 (E. C. L. R. vol. 27), 3 N. & M. 167, A. and B. being partners, A. retired, and B. continued the business, having the partnership effects: C., a creditor,

being told by B. that he must look for payment to him alone, drew a bill of exchange on B. for his debt: the bill was dishonoured, and C. gave B. time to pay: and it was held that these facts raised a question for the jury whether it was not an agreement between B. and C., that C. should accept B. as his sole debtor, and should take the bill of
*466] exchange from him alone by way of satisfaction *for the debt due from both. [WILLIAMS, J.—Has Smith or Moore lost the right to sue the plaintiff?] He has by the agreement. [WILLIAMS, J.—An agreement to which the plaintiff is no party! BYLES, J.—It is not even alleged that the plaintiff had notice that Smith assented to accept the defendant's responsibility.] The parties have all acted upon the arrangement. [KEATING, J.—Is there any difference between this case and Tatlock *v.* Harris, 3 T. R. 180?] In Lilly *v.* Hays, 5 Ad. & E. 548 (E. C. L. R. vol. 31), a debtor of the plaintiff transmitted a sum of money to the defendant, who admitted having received it, and, being afterwards informed that it was meant to be paid to the plaintiff, said that he would so pay it: these statements were communicated to the plaintiff by the defendant's authority: it was held, that, on the defendant's failing to pay, the plaintiff might sue him for money had and received, and that the defendant could not allege a want of consideration moving from the plaintiff to himself. [WILLIAMS, J.—There all three were parties to the arrangement.] The plaintiff here authorizes the defendant to attorn (so to speak) to Smith; and the latter assents to the attornment. It was not necessary that the three should be present all together. [ERLE, C. J.—The utmost the plea amounts to is, that the liability of the defendant is accepted by Smith as a collateral security.] It was not necessary to show the original debt to have been discharged. It was enough to allege that the defendant was accepted as surety, and so became liable to Smith. [WILLIAMS, J.—What consideration was there to support an action by Smith against the defendant?] Mere forbearance would be ample consideration.

Brown, in reply, suggested another fatal objection to the sixth and eighth pleas, viz. that they were no answer to the *last* count, and therefore were bad altogether.

*467] **Lush* asked leave to amend in this respect.

ERLE, C. J.—As to the construction of the contract, we require a little time to consider. As to the fifth and sixth pleas, in which the defendant relies upon an equitable set-off,—it is clear that the plaintiff has a money demand due to him from the defendant, and that the defendant has through his trustee Dunlop, a money demand against the plaintiff, which but for the intervention of the trustee would have constituted a good legal set-off. The case of Clark *v.* Cort, 1 Cr. & Ph. 154, seems to me to be a distinct authority that the court of equity would allow the defendant, where the debt is due to a trustee for him, to have all the benefit he would have had if the debt had been a legal debt due to himself without the intervention of the trust: in other words, the court of equity would have allowed the set-off. I am therefore of opinion that our judgment must be for the defendant upon these two pleas. As to the seventh and eighth pleas, which are pleaded by way of accord and satisfaction, I am of opinion that they are bad pleas. It is well known in law, that, if three persons stand in the relation in which the plaintiff, the defendant, and Smith are stated to stand in the seventh

plea, and the three agree that the plaintiff shall be discharged of the debt due from him to Smith, and that the defendant's liability to the plaintiff shall be transferred to Smith, the agreement may be pleaded as a discharge by the defendant of the debt due from him to the plaintiff. But short of that I am not aware that there would be any valid defence. I see nothing on the face of the plea to estop Smith from suing the plaintiff. He does not discharge the plaintiff merely because he gets by way of collateral security the defendant's promise that he will pay him the debt due from him to the plaintiff. These two pleas, therefore, *in my judgment fall far short of the known requirements of a plea of accord and satisfaction, and consequently upon the demurrers to them the plaintiff is entitled to our judgment. [*468

WILLIAMS, J.—I am of the same opinion. As to the fifth and sixth pleas, I apprehend the established rule of equity with reference to set-off, is, to look upon the beneficial owner as the real owner, and by injunction to compel other courts to regard his rights, and to disregard the legal title of the trustee. That being so, it is the same as if the debt due from the plaintiff to Dunlop, the trustee, had been due to the defendant, the cestui que trust, in which case it cannot be doubted that it would constitute a good legal set-off. Our judgment on these two pleas, therefore, must be for the defendant. As to the seventh and eighth pleas, they seem to me to amount to this,—I, the defendant, am discharged, because I took upon myself the debts due from you, the plaintiff, to Smith and to Moore. The pleas, however, do not allege that the defendant relieved the plaintiff from all responsibility in respect of the debts to those two persons,—no agreement as between the plaintiff and Smith or the plaintiff and Moore that he the plaintiff should in consideration of the defendant's taking the debts upon himself be relieved therefrom. The pleas, therefore, present no defence, and our judgment must be for the plaintiff.

BYLES, J., and KEATING, J., concurred. *Cur. adv. vult.*

BYLES, J., now delivered the judgment of the court:—

All the questions arising on this record were disposed of by the court at the hearing, except the *demurrer to the first plea. The judgment on that demurrer depends on the construction to be put on the contract set out in the first count of the declaration. That contract may be fairly open to several constructions not necessary to be here considered: but, with reference to the present question, we think the parties (who should seem to have been dealing with large sums of money) appear by the contract itself to have contemplated what has actually happened, that is to say, a first instalment paid by Mr. Watson to the defendant exceeding 500*l.* Now, the contract provides, that, *out of* that first instalment, 500*l.* shall be handed over by the defendant to the plaintiff, and does not in terms provide for the payment of any proportion or percentage on the residue of that first instalment, although the expression "out of" should seem in this part of the contract, as it clearly does in the next clause, to import that there will be a residue. And when in this next clause the contract comes to deal with the 10 per cent., it states out of what funds that 10 per cent. is to come,—that it is to come out of any *further moneys* paid by Watson to the defendant; by which provision we understand, in the events which have happened, that the stipulated percentage is to come pro ratâ out [*469

of any further instalment or instalments paid by Watson to the defendant beyond the first instalment of 200*l.*

No more than one instalment by Watson having been received by the defendant, the plea therefore is an answer to any claim of a percentage ultrà the 500*l.* due on that first instalment.

I am desired by the Lord Chief Justice to say that he concurs in this judgment with some degree of doubt.

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*470] *RAND and Another *v.* GREEN and Another.
Nov. 9.

A notice of a meeting at which a church-rate was made was given in these terms,—"The churchwardens, overseers, and *other principal inhabitants* of *this parish* are requested to meet *in the vestry* on, &c., at, &c., to examine the churchwardens' accounts and *to grant them a rate*:"—

Held, a sufficient notice within the 58 G. 3, c. 69, s. 1, and 7 W. 4 & 1 Vict. c. 45, s. 2, although it was sworn that there were several *principal inhabitants* of the parish who were not in a position to be rated, and several others who *were* rated but were not *inhabitants*.

PHILBRICK moved for a prohibition to the judge of the Arches Court of Canterbury commanding him to stay proceedings in a certain suit for substraction of church-rate.

The affidavits upon which the motion was founded stated, in substance, that, in the year 1859, Joseph Rand and William Grimwade, the churchwardens of Hadleigh, in Suffolk, and diocese of Ely, and province of Canterbury, instituted a suit in the consistorial and episcopal court of Ely against John Green and Joseph Green, two of the parishioners and inhabitants of Hadleigh, for the recovery of 6*l.* 1*s.* 9*d.* alleged to be lawfully assessed upon them as such parishioners and inhabitants for a church-rate made in the said parish in the month of July, 1858: That, on Tuesday, the 30th of August, 1859, the proctor of Rand and Grimwade presented letters of request under the hand of the chancellor of the consistorial and episcopal court of Ely lawfully constituted, bearing date the 27th of August, 1859, before a surrogate of the said diocese, which the said surrogate was pleased to accept and to decree that the suit should be and thereupon the suit was removed from the said consistorial and episcopal court of Ely into the Arches Court of Canterbury: That, on the 2d of November, 1859, the said proctor of Rand and Grimwade exhibited in the said Arches Court of Canterbury proxy under the hands and seals of Rand and Grimwade, and returned decree, and the said John Green and Joseph Green duly appeared in the said Arches Court: That, on Thursday, the 2d of February, 1860, the said proctor of Rand and Grimwade brought in a libel in the said suit,

*471] *with exhibits thereto, marked No. 1, No. 2, No. 3, and No. 4, also the church-rate book marked No. 5, referred to in the said libel, and the judge of the said Arches Court, to hear on admission of the said libel and exhibits assigned the next court day: That the first article of the said libel pleaded, amongst other things, as follows,—"That the parish church of the said parish of Hadleigh was in need of certain repairs; that the churchwardens had not sufficient funds in hand to effect such repairs and to provide necessaries for the decent celebra-

tion of Divine service and offices therein, and for the other expenses necessarily and legally incident to their office for the then current year; wherefore they, the churchwardens aforesaid, and the overseers of the poor, and other the parishioners and inhabitants (rate-payers) of the said parish, on the 14th of July, 1858, met together in the vestry-room of the said parish pursuant to notice thereof previously and duly given according to law, to make a rate in order to raise funds for the purposes aforesaid;" and the said article then proceeded to state at the said meeting the making of a church-rate of 3*d.* in the pound was proposed and seconded, but an amendment negativing the same was carried, whereupon a poll was demanded by the said churchwardens, and duly had, and that, in the result of the said poll, the said rate was carried by a large majority: That the second article of the said libel, in supply of proof thereof, referred to the original vestry meeting book of the aforesaid parish of Hadleigh, and annexed four paper writings to the said libel, marked respectively, No. 1, No. 2, No. 3, and No. 4, and alleged and proposed that marked No. 1 to be and contain the original notice convening the said vestry meeting of the 14th of July, 1858: That the third article of the said libel pleaded that the said John and Joseph Green, at the time of making the said rate, were joint *occupiers of a certain farm and premises in the parish of Hadleigh, [*472 of the yearly rateable value of 487*l.*, and that they were duly and legally assessed to the said rate at the sum of 6*l.* 13*s.* 9*d.*: That the notice so mentioned and referred to in the said first and second articles of the said libel was as follows,—"Notice is hereby given. The churchwardens, overseers, and other principal inhabitants of this parish are requested to meet in the vestry on Wednesday, the 14th July instant, at ½ past 9 o'clock in the forenoon, to examine the churchwardens' accounts and to grant them a rate. Given under our hands this 3d day of July, 1858. J. Rand, W. Grimwade, churchwardens:" That, on the 22d of February, 1860, the judge of the Arches Court, and sitting as such judge thereof, heard counsel for John and Joseph Green against the admission of the libel to proof, and for Rand and Grimwade in behalf of admitting the said libel to proof; and it was objected before the said judge that the said notice convening the said meeting of the said 14th of July, 1858, was insufficient, on the following grounds,—that no parish was mentioned by name in the said notice, and that consequently it was no notice to the parishioners of Hadleigh, and that, from the mere circumstance of the affixing of such notice on the doors of the parish church of Hadleigh, it could not be held to be a notice to the parishioners or rate-payers of that parish,—that the said notice was not in its terms positive,—that the parish or vestry or any meeting could be held, it containing a mere request to meet, and not an absolute appointment of a meeting,—and that the notice was defective on the ground that by its terms it was directed to the churchwardens, overseers, and principal inhabitants of the said parish, not to the rate-payers or parishioners thereof generally: That the said judge of the said Arches Court overruled all the said objections *to the said notice, [*473 and held that the same was good and sufficient in point of law, and admitted the said libel to proof: That the said suit in the said Arches Court is still pending and being prosecuted against the said John and Joseph Green: That the said John and Joseph Green are

advised and believe that the said decision of the said judge of the Arches Court, so holding the said notice to be good and sufficient in point of law, and admitting the said libel to proof, was and is erroneous: And that no appeal against the said decision, has been made or is pending.

There was a further affidavit stating that there now are, and during the whole of the year 1858 there were, persons,—naming three clergymen of the church of England and a solicitor,—who were inhabitants of the parish of Hadleigh, but who by reason of their living in lodgings were not assessed to any of the parochial rates, &c., and that there were several messuages, lands, hereditaments, and premises in the tenure or occupation of divers persons who then were not nor ever at any time had been resident therein or thereupon, and who were not then, neither had they since been, inhabitants of the parish, but who nevertheless then were and from time to time since had been and were then rated and assessed to the poor-rates and church-rates from time to time made in the said parish; and that among such persons there were influential persons of good standing in society, some of whom occupied property of considerable magnitude in the parish, and contributed largely to the parochial charges.

By the 1st section of Sturges Bourne's Act, 58 G. 3, c. 69, it was provided that, "no vestry or meeting of the inhabitants in vestry of or for any parish should be holden until public notice should have been given of such meeting, and of the place and hour of holding the same, and the special purpose thereof, three days *at the least before the day to be appointed for holding such vestry, by the publication of such notice in the parish church or chapel on some Sunday during or immediately after Divine service, and by affixing the same, fairly written or printed, on the principal door of such church or chapel." That provision is modified by the 7 W. 4 & 1 Vict. c. 45, s. 2, which requires the notice to be affixed "on or near to the doors of all the churches and chapels within such parish or place." In Bacon's Abridgment, *Churchwardens* (C), it is said, that "the churchwardens have no power to make any rate themselves, exclusive of the parishioners; their duty being only to summon the parishioners, who are to meet for that purpose." So, in Burn's Ecclesiastical Law, *Church-Rate*, 9th edit. Vol I., p. 378, it is said, that "rates for reparation of the church are to be made by the churchwardens, together with the parishioners, assembled upon public notice given in the church." The law is laid down in similar terms in Steer's Parish Law, 3d edit. 444. In Smith *v.* Deighton, 8 Moore's P. C. 175, it was held that it is essential to the validity of a church-rate, that the notice summoning the parishioners together should clearly apprise them of the special purpose for which the vestry meeting is to be called. Dr. Lushington, in giving judgment, there says: "Undoubtedly, it was the intention of the legislature in framing this statute (58 G. 3, c. 69), to provide that due information should be given to all the parishioners of the special purpose for which their attendance is required. These enactments were made to remedy the great evils that had arisen from convening a meeting upon a general notice, the parishioners being entirely ignorant of the particular purpose for which they were called upon to meet." The notice in question is defective in three respects,—first, it is no notice of a vestry,—secondly,

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it gives no certain notice that a *vestry will be held—thirdly, it is not a notice to the *rate-payers* of the parish of Hadleigh, but is directed to the wrong persons, viz. "to the churchwardens, overseers, and other principal inhabitants" of the parish. Rated parishioners are not necessarily inhabitants of the parish: Richardson *v.* Gladwin, 1 Ellis, B. & E. 138 (E. C. L. R. vol. 96). This notice in terms, therefore, includes persons who have no right to attend the vestry, and excludes some who have a right to attend. Medland *v.* Paine, 4 Jurist, N. S. 1283, was also referred to. [*475

ERLE, C. J.—I am of opinion that there ought to be no rule in this case. The duty imposed by law upon the churchwardens, is, to give notice to those who have a right to attend, that a vestry meeting will be held, and also of the purpose for which it is to be so held. The notice in question appears to me to comply substantially with these requisites. It is a notice intended for the parish of Hadleigh, and is affixed on or near the parish church of Hadleigh; and it is in these words,—"Notice, &c. The churchwardens, overseers, and other principal inhabitants of this parish are requested to meet in the vestry on Wednesday, the 14th July instant, at, &c., to examine the churchwardens' accounts, and to grant them a rate." It is said that this was calculated to mislead those to whom it was addressed. But, when we consider, that, under the old law, when the notice was orally given in the church,—as many of us will remember,—it was in terms addressed to "the inhabitants of this parish," I think the written or printed notice is much more capable of being understood if it is directed to the inhabitants of "this parish," the parish of the church on which it is affixed, than if the parish were designated by the name of the saint to whom in former days it was dedicated. Then, is the notice addressed to *the persons who have a right to attend the vestry? At common law, all the residents in the parish would be included in the invitation to attend. The term "resident" being a very loose term, the 58 G. 3, c. 69, gave a more defined rule whereby to ascertain who were the parties entitled to be present, viz., those who occupy property liable to be rated at that meeting. Is this notice so addressed that any person having a right to attend could reasonably consider himself excluded by it? No case has ever decided that the notice must be addressed to persons occupying rateable property in the parish: and the argument of Mr. *Philbrick* has failed to satisfy me that any inhabitant of the parish of Hadleigh who is liable to be rated, could consider himself excluded from the vestry by the terms of this notice. It is said that there are certain persons to whom this document would seem to be addressed who are merely lodgers, and therefore are not entitled to be present at the vestry meeting. That, however, can hardly be relied upon as a tangible objection. Then it is said that this is not a *notice*, but a mere *request* to attend. The adoption of language of common courtesy surely will not vitiate a notice. There is a clear intimation here that a vestry meeting will take place at the time and place mentioned, and for the purpose mentioned, viz., to make an ordinary church-rate. If this had been a meeting for the making of a church-rate for any unusual purpose, —for instance, for the purpose of raising a sum to pay off money borrowed,—that should have been specifically expressed on the face of the notice. But this is professedly for an ordinary church-rate; and I think [*476

nobody who wished to understand it could possibly be misled by it. It requires some degree of astuteness to find any fault with it. I must confess my utter inability to see that this notice is open to any objection.

*477] *BYLES, J.(a)—I also am of opinion that this is a perfectly good notice. In country parishes, the persons whose duty it is to give these notices are usually not very learned or very skilled in language: these documents, therefore, should receive a liberal and not a strict and forced construction. I entirely agree with my Lord, that, when one sees that this notice is issued by the churchwardens, and purports to convene a meeting in the vestry for the purpose of granting them a rate, it is impossible to doubt that it was intended at that meeting to make a church-rate. As to the objection that the notice is bad because it is addressed to "the churchwardens, overseers, and other *principal* inhabitants of this parish," and therefore includes some who have no right and excludes others who have a right to attend the meeting,—it cannot be doubted that the notice would have been perfectly good if it had been addressed to "the inhabitants of this parish" generally. The addition of the word "principal" only shows that the word "inhabitants" was not intended to include every person who sleeps in the parish. All it means is, inhabitants who are in a superior station to some others,—persons, it may be, who in respect of their being ratepayers are principal or superior to others who do not enjoy the privilege of being taxed. As to the description of the parish as "this parish," instead of "the parish of Hadleigh," I think it is quite sufficient. Even if it had said "this parish," and had then gone on and described the parish by a wrong name, I incline to think the maxim of Lord Bacon, "Præsentia corporis tollit errorem nominis," would have applied. If I give to John Smith a ring, saying at the time "I give you this ruby ring," and the ring is a diamond ring and not a ruby, that would be a

*478] good *gift of the thing actually handed over. Here, the notice being stuck up on the church, it is the same as if it had in terms addressed itself to "the inhabitants of the parish on the church of which this notice is affixed." I think we should be encouraging idle and mischievous objections to these notices, if we sanctioned the minute criticism here sought to be applied.

KEATING, J.—I am of the same opinion. It is no doubt proper that these notices should be required to state with reasonable accuracy the persons who are to attend and the object for which their attendance is desired. But they must at the same time receive a reasonable construction. I think this notice is sufficient, and that we ought not to cast any doubt upon it by granting a rule. Rule refused.(b)

(a) Williams, J., was engaged in the Divorce Court.

(b) A similar application was made to the Court of Exchequer, and with the like result.

LAMBE *v.* JONES. *Nov.* 26.

The court refused a rule for payment of money under an award, where it appeared that the costs (unascertained) of certain proceedings in Chancery were payable to the other party under the same award.

By an order of reference made at the last Surrey Assizes, a verdict was found for the plaintiff for the sum claimed in the declaration, subject to the award of a barrister, who was empowered to direct that the verdict should stand for such sum as he should think proper, and to whom *the cause and all matters in difference between the parties* were referred, to order and determine what he should think fit to be done by either of them respecting the matters in dispute,—the costs of the cause to be paid to the plaintiff by the defendant, and the costs of the reference and award to be in the *discretion of the arbitrator, who was empowered to direct and award to and by whom and in what manner the same should be paid. [*479

By a judge's order of the 7th of May, 1860, it was directed that the costs of the cause should abide the event as to the amount of damages awarded.

The arbitrator made his award on the 9th of October, as follows:—

"I award that there is not nor was there at any time a partnership inter se between the plaintiff and the defendant: And I award and direct that the proceedings now pending in the Court of Chancery between the plaintiff and the defendant be stayed, and that the costs thereof be paid by the plaintiff: And I further award and assess the damages to which the plaintiff is entitled for the determination of his employment and alleged interests in the business, and for his being charged at the Mansion House and imprisoned, and indicted at the Central Criminal Court, at the sum of 20*s.*; and I award and direct that the verdict found for the plaintiff in the said cause shall stand for that sum; and I further award that there is due from the defendant to the plaintiff a balance of 48*l.* 6*s.* 7*d.*; and I award and direct that such balance be paid by the defendant to the plaintiff: And I further award and direct that the action for slander now pending by the plaintiff against the defendant be stayed, but that the costs thereof be paid by the defendant: And I further award and direct that the plaintiff and the defendant do each bear his own costs of the reference and pay one-half the costs of this award; and that, if either party shall in the first instance pay the whole or more than half the costs of the award, the other party shall repay him so much of the amount as shall exceed the half of the last-mentioned costs."

The whole of the costs of the award, amounting to 103*l.* 17*s.* 10*d.*, was paid by the plaintiff.

*On the 19th of November, the defendant was personally served, and payment of the sum of 48*l.* 6*s.* 7*d.*, the balance mentioned in the award and thereby ordered to be paid by the defendant to the plaintiff, and also the sum of 51*l.* 18*s.* 11*d.*, the moiety of the sum so paid by the plaintiff to the arbitrator for his award, were duly demanded of him, but they remained unpaid. [*480

Upon an affidavit setting forth the above facts, and further alleging that the plaintiff claimed no costs against the defendant in respect of the action of slander referred to in the award,

Macdonnell, on a former day in this term, obtained a rule calling upon the defendant to show cause why he should not be ordered to pay the above two sums.

C. Clark showed cause, upon an affidavit which stated, that, amongst the matters referred was included a question of alleged partnership between the parties, to establish which the plaintiff had filed a bill in Chancery, as to which the arbitrator by his award directed that the proceedings should be stayed and the costs thereof paid by the plaintiff; that, in consequence of such direction in the award, the defendant's attorney conferred with counsel as to the proper course to be adopted for the purpose of terminating the suit, and he advised that the court should be moved that the proceedings be stayed and the plaintiff's bill dismissed with costs; that he accordingly instructed counsel to make such motion, and notice thereof was given to the plaintiff's solicitors; that, on the 15th instant, a motion to that effect was made, the defendant's counsel at the same time stating that it was not desired that the costs of the Chancery proceedings should be at once paid to the defend-
*481] ant, but only that the amount of such costs *should be ascertained, in order that they might be set off against the 48*l.* 6*s.* 7*d.* and the moiety of the arbitrator's fee payable to the plaintiff under the award; that such application was opposed by counsel on behalf of the plaintiff, on the ground that it was irregular, as the award had not been made a rule of the Court of Chancery, and that it was premature, as the time within which either party could move to vary the award had not elapsed; and that the Vice-Chancellor (Sir W. P. Wood), refused to dismiss the application as asked, and stated as his opinion that the motion was not irregular, the application not being to enforce the award, but he thought it premature for the reason above stated, and he directed that it should stand over to the first seal in the sittings after term, with liberty for the defendant to apply, should the plaintiff seek to enforce payment of the moneys payable to him under the award. *Clark* submitted that the plaintiff was not in a position to sustain this motion, inasmuch as the case was not one in which an attachment could have been granted; and that, if the rule were made absolute, the defendant would be deprived of his opportunity of setting off the costs of the proceedings in Chancery.

Macdonnell, in support of his rule, submitted that the costs of the Chancery proceedings could not legitimately form the subject of a set-off against the plaintiff's demand under the award until those costs had been taxed and ascertained.

ERLE, C. J.—I am of opinion that this rule should be discharged. The application is for a rule under the 1 & 2 Vict. c. 110, s. 18, for payment of money due under an award. The affidavits show it to be at least doubtful whether the balance may not be in the defendant's favour.
*482] At all events, I am satisfied that *there is something due from the plaintiff to the defendant which ought to be set off against the plaintiff's claim under the award. If there had been any undue delay on the defendant's part, there might be ground for this application: but there is no such suggestion, and the general tendency of the affidavits negatives it.

BYLES, J.—It is clear that the whole sum sought to be recovered by this rule is not due to the plaintiff, but is subject to a cross-demand

which arises out of the same award. I will only add that it has been held by Parke, B.(*a*) that rules of this nature resemble motions for attachment, and will only be granted where the circumstances are such as to justify that course of proceeding.

The rest of the court concurring,

Rule discharged with costs.

(*a*) See In re Laing and Todd, 13 C. B. 276 (E. C. L. R. vol. 76).

END OF MICHAELMAS TERM.

*IN THE EXCHEQUER CHAMBER. [*483

JORDAN *v.* ADAMS. *Feb.* 8.

Devise of lands to trustees, upon trust "to permit and suffer W. J. to occupy and enjoy, or to receive and take the rents, issues, and profits thereof for his own use and benefit during his natural life; and, after the decease of W. J., then to permit and suffer *the heirs male of his body* to occupy and enjoy the same, or to receive and take the rents, issues, and profits thereof for their several natural lives, in succession, according to their respective seniorities, or in such parts and proportions, manner and form, and *amongst them*, as the said W. J., *their father*, shall by deed or will direct, limit, or appoint; and, in default of such issue male of the said W. J., then over:"—

Held—in the Exchequer Chamber,—by Cockburn, C. J., and Wightman, J., that W. J. took an estate for life only; and by Martin, B., and Channell, B., that he took an estate tail.

THIS was an action brought by the plaintiff against the defendant, to recover damages for the non-completion of a contract entered into between the plaintiff and Thomas Adams, deceased, for the purchase by the said Thomas Adams, deceased, from the plaintiff, of a certain farm, lands, and hereditaments situate in Armscott, in the county of Worcester; and by a judge's order a case was stated for the opinion of the Court of Common Pleas. The case stated, that, on or about the 18th of May, 1825, John Jordan, of Armscott, by his last will and testament in writing, bearing date the day and year last aforesaid, and duly executed and attested as by law required for passing real and personal property, gave and devised as follows:—(*a*)

"5. And, as to all other my freehold and leasehold estates situate at Armscott aforesaid, consisting of various messuages, buildings, homestalls, cottages, and seven yard lands and a half, with right of common thereunto respectively belonging, the said close called Tubb's Close, and all other my freehold and leasehold estates, closes, lands, hereditaments, and premises at Armscott aforesaid, with the commons and other *rights, members, and appurtenances thereunto respectively belonging, I direct and appoint my said trustees, their heirs, executors, administrators, and assigns, to stand and remain seised and possessed of, and to permit and suffer my said kinsman the said William [*484

(*a*) The whole will was made part of the case, and is set out 6 C. B. N. S. 748 (E. C. L. R. vol. 95); but the fifth clause was the one upon which the decision ultimately turned.

Jordan (the plaintiff), son of my said cousin Richard, to occupy and enjoy or to receive and take the rents, issues, and profits thereof for his own use and benefit during his natural life: And I charge the same several estates with the payment of an annuity of 50*l.* a year to his father the said Richard Jordan, which annuity I direct shall be paid him half-yearly during his natural life, and I devise and bequeath the same to him accordingly: And, after the decease of the said William Jordan, then to permit and suffer the heirs male of his body to occupy and enjoy the same, or to receive and take the rents, issues, and profits thereof for their several natural lives, in succession, according to their respective seniorities, or in such parts and proportions, manner and form, and amongst them, as the said William Jordan *their father* shall by deed or will duly executed and attested as by law is required for devising and disposing of real estates, direct, limit, or appoint: And, in default of such issue male of the said William Jordan, then upon trust to and for the use of his brother Richard Jordan, a younger son of my said cousin Richard, and his heirs male, in such parts and proportions, manner and form, as he the said Richard Jordan the younger shall by deed or will duly executed as aforesaid direct or appoint, charged and chargeable, nevertheless, and I do accordingly hereby expressly charge the same several estates, lands, tenements, and premises, in case the said Richard Jordan the younger or his heirs should so as aforesaid become seised and possessed thereof, with the payment
*485] of the sum of 2000*l.* unto and equally amongst and *between the daughters or daughter of the said William Jordan (if any) to whom I give and bequeath the same accordingly, to be paid to them respectively as they shall attain the age of twenty-one years, with interest from the time of the above devise becoming vested in the said Richard Jordan the younger and his heirs as aforesaid: And, from and after the performance of the aforesaid trusts, and subject thereto, then my said trustees shall stand and remain seised and possessed of the said last-mentioned estate to and for the use and behoof of the right heirs of my cousin Robert Jordan, of Little Compton aforesaid, for ever."

By a codicil, bearing date the 10th of June, 1826, the testator devised as follows:—

"Whereas, by my said will I have devised to my trustees therein named three yard lands, and a homestall thereunto belonging, and in the occupation of William Badger, for the use of George Taylor, and as therein is mentioned: Now, I do hereby revoke the whole of the said devise, and in lieu and instead thereof I devise to them my said trustees, for the use of the said George Taylor, and as in my said will is mentioned, and charged with the like annuity to his father, all that messuage or tenement, homestall, and premises, wherein I now live, and the two yard lands and a half thereunto belonging, formerly Taylor's, with all the appurtenances, except the four cottages and gardens, *all which premises were by my said will given and devised to my kinsman William Jordan;* and I devise to him my said kinsman William Jordan the said messuage, three yard lands, and cottages, and also a close that lately belonged to Lord Wentworth, adjoining Bacon's estate, and devised by my will to Thomas Jordan, which devise, so far as it relates to the same close, I hereby all revoke; to hold to him my said kinsman William Jordan and his heirs, as in my said will is mentioned."

*The testator died on or about the 1st of December, 1830, without having revoked (so far as the questions for the opinion of the court are concerned) his said will and codicil. The plaintiff is the William Jordan mentioned in the will and codicil; and the defendant is the executor of the said Thomas Adams, deceased. The testator at the time of making his said will, and from thence until and at the time of his death, remained and was seised in his demesne as of fee of and in the farm, lands, and hereditaments in respect of which this action is brought; and such farm, lands, and hereditaments are part of the testator's estate at Armscott, and were comprised in the devise above set out. [*486

The questions for the opinion of the court were,—first, whether the plaintiff took under the said will and codicil a legal estate tail in the property in respect of which the action is brought,—secondly, whether he took under such will and codicil an equitable estate tail in the said property.

The case was twice argued in the Court of Common Pleas; and in Trinity Term, 1859, that court, after time taken for deliberation, unanimously held, that, under the devise in question, William Jordan (the plaintiff) took only an estate for life.

Against this decision the plaintiff appealed, and the case was argued in the Exchequer Chamber on the 30th of November last, before Cockburn, C. J., Wightman, J., Martin, B., Bramwell, B., Channell, B., and Hill, J., by *Kemplay* (with whom was the *Solicitor-General*), for the appellant, and by *Bovill*, Q. C. (with whom was *Archibald Smith*), for the respondent. *Cur. adv. vult.*

The judges, being divided in opinion, proceeded to deliver their judgments seriatim, as follows:—

*CHANNELL, B.—The question is what estate William Jordan took under the fifth head of devise in the will of John Jordan set out in the case. [*487

The testator by his will devised the lands in dispute to trustees. By the fifth head of his will he directed and appointed the trustees to stand seised thereof, to permit the said William Jordan to occupy the same or receive the rents and profits thereof for his own use during his natural life, and, after his decease, then to permit and suffer the heirs male of the body of the said William Jordan to occupy the same or receive the rents and profits thereof for their several natural lives in succession according to their respective seniorities, or in such parts and proportions, manner and form, and amongst them, as the said William Jordan their father should direct, limit, or appoint; and, in default of such issue male of the said William Jordan, then upon trust to and for the use of his brother, Richard Jordan, and his heirs male, in such parts, shares, and proportions, manner, and form as the said Richard Jordan should appoint, charged, in case the said Richard Jordan or his heirs should become seised thereof, with the sum of 2000*l.* in favour of the daughters, if any, of the said William Jordan. Subject to the performance of the trusts, the testator limited and appointed the estates to the right heirs of Robert Jordan, for ever.

The Court of Common Pleas decided that William Jordan took under the will an estate for life. With the greatest respect for the judgment of that court, I am of opinion that William Jordan took an estate in tail male; and that the decision appealed against ought to be reversed.

I agree in the opinion expressed by my Brother Williams in the judgment of the court below, as reported in the 6th Common Bench Reports, N. S. p. 765, that, but for the use of the words "their father" in the
*488] power of appointment, an estate *in fee would pass by the gift to the heirs male of the body of William Jordan. This consequence seems to me to follow from our giving to the words "heirs male of the body" their legal import, and from the intention apparently expressed in the will that the estate should go over to Richard Jordan and his heirs male, upon failure of the issue male of William Jordan, and not until such failure. But I am unable to concur with my Brother Williams in the conclusion at which,—not, I think, without great doubt and hesitation,—he ultimately arrived, that the words "their father" demonstrated that the words "heirs male of the body" meant "sons," or that the words "heirs of the body" could be controlled by the words "their father," in the power of appointment, as interpreting words, showing in what sense the words "heirs male of the body" had been used by the testator.

The authorities cited on the argument before us are the same as those which were cited in the Court of Common Pleas, with the exception of Roddy *v.* Fitzgerald, decided by the House of Lords,—6 House of Lords Cases 823. All these authorities, excepting the last, are, I believe, collected in Jarman on Wills, 2d edit., by Wolstenholme and Vincent, Vol. 2, p. 267, and 299 and following pages, Ch. 37, particularly in s. 3. I do not profess to reconcile all the authorities. I think it unnecessary to go through them in detail. But I may observe that the case of White *v.* Collins, Com. 289, much relied on by the Court of Common Pleas as an express authority, does not appear to me to be so.

The devise there was, to one for life, and, after his decease, to the heir male (in the singular), not "heirs" in the plural. There are other cases in which the word used was "heir," and not "heirs." This dis-
*489] tinction is not, I think, immaterial. The word "heir" *may be understood as pointing to an individual, whereas the word "heirs" points to a class.

The leading cases appear to me to be Jesson *v.* Wright, 2 Bligh 1, and Roddy *v.* Fitzgerald, 6 House of Lords Cases 823.

The rule in Jesson *v.* Wright, as I understand it, is, that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise. Roddy *v.* Fitzgerald upholds and explains the former case of Jesson *v.* Wright. These decisions appear to me to give the rule of construction which we must apply to the present case. In Roddy *v.* Fitzgerald, the opinions of the judges, both in Ireland and in England, were reviewed by the House of Lords. In their opinions the judges were nearly equally divided: indeed, but for a circumstance noticed by Lord Chancellor Cranworth in the report of the case, the opinions of the judges would have been equally divided. In unison with the opinions expressed by a minority of the judges, I humbly submitted that the words "issue" in Roddy *v.* Fitzgerald,—words more flexible than "heirs of the body,"—had been in that case by the whole context of the will explained and interpreted by the testator himself to mean "children." The House of Lords unanimously rejected this construction, and held that the

words "issue" there used must have their ordinary legal import and effect.

This case of Roddy *v.* Fitzgerald is treated by the Court of Common Pleas as deciding that words that would create an estate tail are to have that effect, unless a judicial mind sees with reasonable certainty from other parts of the will that the testator's intention was that those words should not operate as words of limitation of the inheritance, but should be words of purchase, creating an estate in remainder in the persons coming within *the designation of heirs male of the body, and within the further description contained in the will. [*490

This is, no doubt, so. But if, by reference to the words "their father," in the power of appointment in the will in question, the words "heirs of the body" are explained to be, and are to be read as, sons (the only ground on which, as it appears to me, the decision of the Court of Common Pleas can be supported), then it would seem to me to follow, that, if William Jordan had died having had an only son who had died in his lifetime, but had left a son who survived his grandfather, such grandson would take nothing under the will. I cannot suppose this to have been the testator's intention; and I am therefore unable to adopt the argument that the testator has interpreted the words "heirs of the body" as meaning "sons."

In determining whether the legal import of the words "heirs of the body" is to be cut down, we must not surmise, but must see very clearly that the alleged interpreting words do cut down other words which carry with them a recognised legal meaning.

Consistently with Roddy *v.* Fitzgerald, I cannot hold, either from the power of appointment or the general context of the will, that such was in the present case the intention of the testator.

I am of opinion that the judgment of the Court of Common Pleas ought to be reversed.

MARTIN, B.—This is an appeal from the judgment of the Court of Common Pleas: and the question is, whether, upon the construction of a devise in the will of John Jordan, dated the 8th of May, 1825, William Jordan took an estate in tail male. The substance of the devise is as follows:—"As to certain land (describing it), I direct my trustees to stand seised thereof, and permit William Jordan to occupy the same or receive *the rents and profits thereof for his own use during his natural life; and, after his decease, then to permit and suffer *the heirs male of his body* to occupy the same or receive the rents and profits thereof for their several natural lives in succession according to their respective seniorities, or in such parts and proportions, manner and form, and amongst them, as the said William Jordan, *their father*, should by deed or will, duly executed, direct, limit, or appoint; and, in default of such issue male of the said William Jordan, then upon trust to and for the use of Richard Jordan and his heirs male, in such parts and proportions, manner and form, as he should by deed or will direct or appoint, but charged with the sum of 2000*l.* for the daughters (if any) of the said William Jordan; and after the performance of the said trusts, and subject thereto, that the said trustees should stand seised of the said lands to and for the use of the right heirs of Robert Jordan, for ever." The Court of Common Pleas were of opinion that William Jordan took an estate for life only. All agree that the true rules of construction [*491

are laid down in Jesson v. Wright, 2 Bligh 1, and Roddy v. Fitzgerald, 6 House of Lords Cases 823. If the devise had not contained the powers of appointment, I apprehend there would have been no doubt but that it would have given an estate in tail male to William Jordan. It would have been a devise to him for life, and, after his death, to the heirs male of his body, to occupy the same or take the rents and profits for their several natural lives in succession, according to their respective seniorities, and, in default of such issue male, to Richard Jordan. This would express the intention of the testator that William Jordan should have the land for his life, and that, after his death, his male heirs as a class, that is, in succession according to their respective seniorities, should have it. *It is true it was his intention that they should have it for their lives only, and with no greater power over it than tenants for life have: but this the law does not permit; and it seems to me nothing more than the expression of an intention which by law cannot be effected. Applying the rule in Shelley's Case, 1 Co. Rep. 93 a, which is a technical rule of law, and the doctrine of Jesson v. Wright and Roddy v. Fitzgerald, by construction of law the estate of William Jordan would be an estate in tail male. I think it impossible to express more clearly than these words do the original estate tail contemplated by the Statute de Donis, viz. an estate for life in the donee, and a series of life-estates continuing so long as there were heirs of the body of the donee, they taking in succession in the order and according to the rule of lineal inheritance. This is what an estate tail in substance was, until the courts of law converted it for all practical purposes into an estate in fee simple.

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The judgment of the Common Pleas is, that William Jordan took an estate for life, and that the words "heirs male of his body" meant "sons:" so that, if he had died having had an only son, who had died in his father's lifetime, leaving a son who survived his grandfather, this grandson would take nothing under the devise. Is this correct either in construction of law or as the true expression of the will of the testator? The cases of Jesson v. Wright and Roddy v. Fitzgerald are authorities that the words "heirs of the body" have not only a plain natural meaning, but are also words of known legal import, and primâ facie denote and mean the whole of the descendants or issue as a class, and are to be read and understood in this their natural and legal sense, unless it be clear that the testator intended to use them in a different sense. Lord Wensleydale's expression in Roddy v. Fitzgerald, is, "unless a judicial mind sees *with reasonable certainty from other parts of the will an opposite intention."

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I agree with Mr. Justice Williams that the only other parts of this will to show the opposite intention, are, the words "their father," in the power of appointment. The testator certainly wished that the heirs of his body should take life-estates. This is what nine-tenths,—probably ten-tenths,—of testators who make entails wish: but there is nothing in the expression of it to show that he desired that the grandchildren or more remote descendants of William should not take at all. If the words had been "the father," or "the ancestor," I apprehend they could not have had the effect of altering the legal import of the words "heirs male of the body." And, in my opinion, that which the testator has expressed, and in all probability meant and intended, was, that

William Jordan should have a power to appoint amongst his *sons*, but not that the estate or estates previously given to the heirs male of his body should be altered or affected otherwise or beyond the alteration effected by the exercise of the power.

It appears to me that the use of the words "in default of such issue," and not "in default of such sons," strongly confirms this view. Had the words used been "in default of issue," I should have thought it conclusive. Suppose that William Jordan were dead, and the litigant parties were, his grandson and Richard Jordan,—can it be said that a judicial mind would clearly see from the language of the will that the testator meant Richard to take, and not the grandson? I think not: and, to decide against the grandson, the law requires that this must be made out, and that clearly. The result is, to say the very least, that I do not think there is sufficient in the will to justify the alteration or cutting down of the *words "heirs male of the body," which [*494 are words having a plain, clear, natural meaning, and are also technical words of a known legal import and meaning, into "sons." I cannot bring my mind to the conclusion that the testator has expressed his will to be that Richard Jordan should take in exclusion of William's grandchild.

If there were any decision upon the point, I would readily yield: but none has been cited before us. It is said in the judgment of the Common Pleas that the case of White *v.* Collins, 1 Comyns 289, is in point for the defendant. I do not agree in this at all. The devise there was to a son, F., to enjoy during his life, and, after his death, to the heir male of the body of F. (in the singular number), during the term of his natural life, and, for want of such heir male, to another son, C., a brother of F.'s. Whatever doubts may have existed at the time when this case was decided, the works of Mr. Fearne, a subsequent writer, have abundantly cleared them up: and it seems to me that the words of that will clearly express, that, by the word "heir," was meant an individual, and not the heir of the body of F. as a class.

I quite concur with Mr. Justice Blackstone (1 Hargr. Tracts, p. 505), that common sense showed the meaning of the expression used. I concur also with the Court of Common Pleas as to the importance of adhering to the doctrine of Jesson *v.* Wright, confirmed in Roddy *v.* Fitzgerald: and I do so in expressing my opinion that William Jordan took an estate tail.

WIGHTMAN, J.—I am of opinion that the judgment of the Court of Common Pleas is right, and that the plaintiff took only an estate for life in the premises in question, and not an estate tail, either legal or equitable.

*The testator by his will devised all his freehold and leasehold [*495 estates to trustees, and directed them, as to the premises in question, "to permit and suffer the plaintiff to occupy and enjoy or to receive and take the rents, issues, and profits thereof for his own use and benefit during his natural life, and, after the decease of the plaintiff, then to permit and suffer *the heirs male of his body* to occupy and enjoy the same or to receive and take the rents, issues, and profits thereof for their several natural lives, in succession, according to their respective seniorities, *or* in such parts and proportions, manner and form, and *amongst them*, as the said William Jordan (the plaintiff), *their father*,

should by deed or will direct; and, in default of such issue male of the said William Jordan, then over.

The question is, whether the words "heirs male of his body," as used in this devise, are words of limitation or words of purchase: and it appears to me, that, taking the whole clause together, they are words of purchase, and mean the sons of the plaintiff, who are to take for their lives in succession, according to seniority or in such proportions, manner, and form amongst them as their father (the plaintiff) should by deed or will direct. I am unable to give any other meaning to the clause in question; and, though, by the use of the words "heirs male of the body," the testator may be supposed to have intended to give an estate in tail to the plaintiff, as those words standing alone and unexplained by the rest of the clause would be words of limitation and not of purchase, yet the subsequent words, that they (the heirs male) are to take the profits, &c., of the estate for their natural lives in succession, according to their respective seniorities, or in such manner as their father shall by deed or will direct, show too clearly in my opinion *to admit of doubt, that the testator, by "heirs male of the body," meant the "sons" of the plaintiff, who were to take in succession for life, or in such parts and proportions between them as their father should direct.

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I have forborne to observe upon the cases which were cited upon the argument, the question in all the cases, as in this, being, what was the intention of the testator by the terms he used in his will; and, as everything depends upon the words used, it seems to me that little assistance is derived from decisions upon terms which are not the same as those used in the will in question. I therefore think, drawing my conclusion from the terms actually used by the testator in this case, that the court below was right in the conclusion to which it came, and that the judgment should be affirmed.

Cockburn, C. J.—I am of opinion that the judgment of the Court of Common Pleas should be affirmed; but, being unable to concur in all the reasons on which the decision of the majority of that court appears to have been founded, I think it necessary to explain the grounds on which the conclusion I have arrived at is based.

We are called upon to construe a devise, whereby a testator gives certain estates to trustees, in trust to permit one William Jordan to occupy and enjoy or to receive and take the rents and profits for his own use and benefit, during his natural life, and, after his decease, to permit and suffer the heirs male of his body to occupy and enjoy the same, or to receive and take the rents and profits, for and during their natural lives, in succession, according to their respective seniorities, or in such parts and proportions, manner and form, and amongst them, as the said William Jordan, their father, shall by deed or will duly executed and attested direct, limit, and appoint; and, in *default of such issue male of William Jordan, then over.

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The question is, whether under this devise William Jordan (who is the plaintiff in this action) took an estate for life or an estate tail,—or, to put the same thing in another form,—whether the heirs male of his body took an estate by purchase or by descent.

Three things occurring in this devise are relied on to take it out of the ordinary rule that a gift to a man for life, with remainder to the heirs of his body, creates in point of law an estate tail in the ancestor.

These are, first, that the devise to the heirs is for their natural lives; secondly, that their estate is subject, with reference both to the order of succession and quantity of estate, to the appointment of the ancestor; thirdly, that the ancestor is distinctly described as the father of the heirs male of the body, from which it is said to be plain that the words "heirs male of the body" must necessarily be read as *sons*.

I am of opinion, that, in construing this devise, the two first circumstances cannot be taken into account. I take the effect of the authorities on this subject clearly to be, that, where land is devised to a man for life, with remainder to his heirs, or the heirs of his body, no incident superadded to the estate for life, however clearly showing that an estate for life merely and not an estate of inheritance was intended to be given to the first donee, nor any modification of the estate given to the heirs, however plainly inconsistent with an estate of inheritance, nor any declaration however express or emphatic of the devisor, can be allowed, either by inference or by the force of express direction, to qualify or abridge the estate in fee, or in tail, as the case may be, into which, upon a gift to a man for life, with remainder to his heirs, or the heirs of his body, the law inexorably converts the entire *devise in favour of the ancestor, notwithstanding the clearest indication of the intention of the donor to the contrary. Thus, with reference to the estate for life, although the donor may have superadded to it some incident of an estate of inheritance, for instance, as in Papillon *v.* Voice, 2 P. Wms. 471, unimpeachability of waste, or, as in King *v.* Melling, 2 Lev. 58, a power of jointuring, both which provisions would have been superfluous if an estate of inheritance had been intended; or although, as in Coulson *v.* Coulson, 2 Str. 1125, he may have interposed trustees to preserve contingent remainders,—a provision palpably inconsistent with the estate of the ancestor being other than an estate for life; or though he may have declared in express terms, as in Perrin *v.* Blake, 4 Burr. 2579, 1 Sir W. Bl. 672, that his intention in creating the estates for life was to prevent any of his children from disposing of his estate for longer than his life; or although, as in Robinson *v.* Robinson, 1 Burr. 38, he may have expressly declared that the estate for life should last for the life of the devisee and *no longer;* or, as in Roe d. Thong *v.* Bedford, 4 M. & Selw. 362, has declared that the devisee should have no power to defeat his intent;—none of these provisions or declarations will avail anything. So, on the other side, with reference to the estate to the heir, although the devisor may have annexed to it incidents wholly inconsistent with an estate by descent,—as, that the heirs shall take according to the appointment of the ancestor (as in Doe d. Cole *v.* Goldsmith, 7 Taunt. 209 (E. C. L. R. vol. 2)), or that the heirs shall take as tenants in common (as in Bennett *v.* The Earl of Tankerville, 19 Ves. 170), or share and share alike (as in Jesson *v.* Wright, 2 Bligh 1), or without regard to seniority of age (which, though held in Doe d. Hallen *v.* Ironmonger, 3 East 533, to prevent the operation of the rule, would now-a-days, it *seems, receive an opposite construction; see 2 Jarm. Wills 303), no inference arising from such provisions can be allowed to prevail against the rule of law: nay, even although a devisor should expressly declare that the heirs should take by purchase and not by descent, the declaration would be set aside as unavailing (see Harg. Law Tracts 562).

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When once the donor has used the terms "heirs," or "heirs of the body," as following on an estate of freehold, no inference of intention, however irresistible, no declaration of it, however explicit, will have the slightest effect. The fatal words once used, the law fastens upon them, and attaches to them its own meaning and effect as to the estate created by them, and rejects, as inconsistent with the main purpose which it inexorably and despotically fixes on the donor, all the provisions of the will which would be incompatible with an estate of inheritance, and which tend to show that no such estate was intended to be created; although, all the while, it may be as clear as the sun at noonday that by such a construction the intention of the testator is violated in every particular.

Such being the principle involved in the decisions of the House of Lords in the cases of Perrin *v.* Blake, 4 Burr. 2579, 1 W. Bl. 672, Jesson *v.* Wright, 2 Bligh 1, and Roddy *v.* Fitzgerald, 6 House of Lords Cases 823, it appears to me that we cannot give any effect to the provisions of this devise that the heirs shall take by appointment, or, in default of it, in succession, for their natural lives. If, indeed, the matter were res integra, I should entirely concur with the majority of the Court of Common Pleas in thinking that these provisions ought to be conclusive as to the intention of the testator. Speaking under the shadow of the great names of Lord Mansfield and Lord Ellenborough, and the eminent judges of the Court of Queen's Bench who *were parties to the decisions of that court in Perrin *v.* Blake and Doe d. Strong *v.* Goff, 11 East 668, and of those who in the Common Pleas decided the cases of Crump d. Woolley *v.* Norwood, 7 Taunt. 326 (E. C. L. R. vol. 2), and Gretton *v.* Haward, 6 Taunt. 94 (E. C. L. R. vol. 1), I have no hesitation in saying, that, but for the decisions of the supreme court of appeal, I should certainly have held that an arbitrary rule of law as to the effect of certain words might well be made to yield, as similar rules have in other instances been made to yield, in construing a devise, to the rule,—one of paramount importance in construing wills and devises,—that effect is to be given to the intention of the testator; conformity to which is in my opinion ill obtained by forcing on the testator a meaning directly the reverse of what he really intended. But we are, of course, bound by the decisions of the House of Lords; and, as the law has been there settled, so we must apply it.

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But, although the rule thus established is inflexible to the extent I have stated, there is, nevertheless, one quarter from which it permits light to be let in and effect to be given to the real intention of the testator: this is where, by some explanatory context, having a direct and immediate bearing upon the term "heirs," or "heirs of the body," the devisor has clearly intimated that he has not used these words in their technical, but in their popular sense, namely, that of sons, daughters, or children, as the case may be. An illustration of this branch of the rule is given by Lord Brougham in his judgment in Fetherston *v.* Fetherston, 3 Cl. & F. 67: "If there is a gift to A. and the heirs of his body, and then, in continuation, the testator, referring to what he had said, plainly tells us that he used the words 'heirs of the body' to denote A.'s first and other sons, then clearly the first taker would only take a life estate."

*This appears to me to be directly applicable to the present case, with reference to the direction of the testator, following [*501 immediately on the devise to the heirs male of the body of William Jordan, that they shall take "in such parts, proportions, manner, and form, and amongst them, as the said William Jordan, *their father*, shall direct." We cannot reject these words: there is no authority for saying that the particular intent is to yield to the general one,—at all times an unsatisfactory rule,—to the extent that, where the testator has himself afforded a clear indication of the sense in which he has used the words, we are to reject his own interpretation, in order to preserve the legal effect of the term "heirs of the body:" on the contrary, the cases of Lowe *v.* Davies, 2 Ld. Raym. 1561 (per nom. Law *v.* Davis, 2 Stra. 849, 1 Barnard 238), of Lisle *v.* Gray, 2 Lev. 223, and Goodtitle d. Sweet *v.* Herring, 1 East 264, 3 B. & P. 628 (in which last case the judgment of the Queen's Bench was affirmed in the House of Lords), and the cases of North *v.* Martin, 6 Sim. 266, and Doe d. Woodall *v.* Woodall, 3 C. B. 349 (E. C. L. R. vol. 54), establish conclusively, that where, following on a gift to heirs of the body, the term "son or sons," "daughter or daughters," or "child or children," is used in apposition, as it were, to the term heirs of the body, the latter is to be taken in its more restricted and not in its legal sense. The cases of Pope *v.* Pope, 14 Beav. 591, Gummoe *v.* Howes, 23 Beav. 184, and Smith *v.* Horsfall, 25 Beav. 628, are equally in point as establishing that the same effect is produced in limiting the term "issue," which, when unexplained by the context, has, as is now well established, the same force as the term "heirs of the body." In Smith *v.* Horsfall, 25 Beav. 628, the Master of the Rolls says: "Issue here means children; and such is its signification in all cases where a direct reference is made to the parent *of the issue. I entertain no doubt on the point; and I [*502 should be unsettling the law if I were to hold the contrary."

It is quite plain, according to these authorities, that if, in the present devise, the devisor, after the gift to the heirs male of the body of William Jordan, had gone on to say, "the said sons of the said William Jordan to take in such parts, &c., as the said William Jordan shall appoint," this direction must have had the effect of giving to the term heirs male of the body the more limited meaning of sons. Now, this, although in another form, the testator has to all intents and purposes done: for, what possible difference can there be between speaking of the heirs of the body as the sons of the first taker, and of the first taker as the father of the heirs? Instead of using the one form of expression, the testator has used the correlative and corresponding one, and one altogether equipollent in effect. He has given his own key to the meaning of the words "heirs of the body of William Jordan," namely, those heirs of the body of William Jordan of whom William Jordan is the father, that is, the sons of William Jordan. The authorities are as strong for giving effect to such an exposition of a testator's meaning of the term "heirs of the body," where it exists, as for enforcing the technical meaning where it does not. We have no right, as it seems to me, to reject these words, or to hold them to mean something else, so as to give to William Jordan an estate tail; more especially as all the other provisions of the devise lead only to the conclusion that the testator never entertained the intention to give him any such estate.

Nor am I embarrassed by the use of the words "in default of such issue," which follow in the ensuing limitation. The word "issue" is, as every one knows, a flexible term: if the term "heirs of the body" *503] can *be controlled by an explanatory context, the term "issue" cannot be less susceptible of being modified in like manner. The "issue" here spoken of are plainly the same as were previously spoken of as "heirs male of the body." If the latter are shown by the context to have been the sons of William Jordan, such also must be the meaning of the term "such issue."

The judgment of the House of Lords in the case of Roddy *v.* Fitzgerald, which was pressed on us in the argument, does not, as it appears to me, conflict with this view. It was not at all intended by that decision, as I read the judgments of Lord Cranworth and Lord Wensleydale, to overrule the numerous cases at common law and in equity to which I have last referred; or all that class of cases (collected in 2 Jarm. Wills 273–277), in which the term "issue" has been cut down to mean sons, daughters, or children, by the testator having used one or other of those terms in the context of the will. Lord Cranworth expressly says,—"Where the testator shows upon the face of his will that he must have used technical words in another than their technical sense, there is no rule that prevents us from saying that he may be his own interpreter:" and again, "The word 'issue,' when used in a will, is primâ facie a word of limitation; but, if the context makes it apparent that the word is not so used, then it may be treated as a word of purchase." The question in the case, as put by Lord Cranworth, was, whether in a devise to testator's son William for life with remainder to his issue, in such manner, shares, and proportions as he should appoint, and, in default of such appointment, then to the issue equally, if more than one, and, if only one child, to the said child; and on failure of issue, over,—there was anything in the context to control the ordinary effect of the term "issue." And the House of Lords held that there *was not. "Issue," being, as was pointed out by Lord Wensley- *504] dale, primâ facie equivalent to heirs of the body, the direction that the heirs should take according to the appointment of the ancestor, or, in default of appointment, in equal shares, was altogether inoperative, as settled by the authority of Jesson *v.* Wright. The further provision, which seems to have been added by the testator unnecessarily and ex nimiâ cautelâ, that, in the event of there being but one child, that child should take the whole, did not appear to their Lordships strong enough to control the larger sense of the word "issue." But there is nothing to show, that, if the context had been sufficiently clear and strong for that purpose, their Lordships would not have given effect to it. On the contrary, as I have pointed out, Lord Cranworth's language is a clear recognition of the existence of the rule as I have stated it farther back. Looking at that language, I cannot but think, that if, in Roddy *v.* Fitzgerald, the testator had, as in the present instance, described the first taker as the *father* of those whom he spoke of as his issue, effect would have been given to so striking an exposition of his meaning. I find no intimation of any intention to overrule the numerous cases already referred to in which the more general terms "heirs of the body" and "issue" have been restricted by words used in juxtaposition importing issue in the first generation only, to the latter more limited meaning.

Nor can I suppose that their Lordships would have overruled such a series of authorities silently, and, as it were, by implication, or without a clear intimation of their intention to do so. I therefore consider them as still in force and binding upon us.

Being, then, of opinion that the devisor has afforded a clear indication of the sense in which he has used *the term "heirs male of the body," namely, that of sons,—from which, of course, it would follow that no estate of inheritance was created, and that consequently William Jordan took only an estate for life,—I hold,—but on this ground alone,—that the judgment of the Court of Common Pleas should be affirmed. [*505

The Court being thus equally divided, the Lord Chief Justice intimated, that, if the parties wished to carry the case further, one of its members would withdraw his opinion, so that the judgment of the Court of Common Pleas might stand Affirmed.

FITZJOHN *v.* MACKINDER. *Feb.* 8.

M. sued F. in the county court for a debt. F. claimed a set-off, in answer to which M. produced his ledger containing an acknowledgment signed, as he swore, by F. F. denied the signature, which he averred to be a forgery; but the judge, induced partly by the statement of M. and partly by the conduct of F. before him, disbelieving F.'s denial, committed him for trial for perjury, under the 14 & 15 Vict. c. 100, s. 19, and bound M. over to prosecute. F. was accordingly tried for perjury, and acquitted.

F. then brought an action against M. for maliciously and without probable cause causing him to be prosecuted on an unfounded charge:—

Held, by Cockburn, C. J., Bramwell, B., and Channell, B., on appeal,—reversing the judgment of the court below, and contrary to the opinions of Wightman, J., and Blackburn, J.,—that the action was maintainable; the committal of F., and his prosecution for perjury, being the result of the wrongful and malicious act of M.

THIS was an appeal by the plaintiff, under the provisions of the Common Law Procedure Act, 1845, 17 & 18 Vict. c. 125, s. 34, against the decision of the Court of Common Pleas in discharging a rule of that court granted in this cause on the 5th of November, 1859, to set aside the nonsuit entered on the trial of this cause, and instead thereof to enter a verdict for the plaintiff with 200*l.* damages, upon a point reserved at the trial.

The declaration contained two counts.

The first count stated that the defendant falsely and maliciously, and without any reasonable or probable cause, at the county court of Rutlandshire holden at *Oakham, in the said county, before Robert Miller, Esq., serjeant-at-law, judge of the said county court, went and appeared before the said judge in support of a certain action in contract then pending in the said county court, in which the said now defendant was the plaintiff and the said now plaintiff was the defendant; and the said now defendant then and there falsely and maliciously, and without any reasonable or probable cause, caused and procured the said county court judge to direct the said now plaintiff to be prosecuted for perjury in certain evidence given by him before the said county court judge in the said action, and then falsely and maliciously, and without any reasonable or probable cause, caused the said county court judge to commit the now plaintiff so directed to be prosecuted as aforesaid, until [*506

the next assizes for the said county of Rutland, then and there to take his trial for the said alleged offence, unless the said now plaintiff should enter into a recognisance with one or more sufficient surety or sureties conditioned for the appearance of the said now plaintiff at such then next assizes for the said county, and that he would then surrender and take his trial, and not depart the court without leave.

The second count stated that the said now defendant afterwards falsely and maliciously, and without any reasonable or probable cause, indicted and caused the said now plaintiff to be indicted for wilful and corrupt perjury; that the now defendant afterwards falsely and maliciously, and without any reasonable or probable cause, prosecuted and caused to be prosecuted the said indictment against the said now plaintiff, until the said now plaintiff afterwards, to wit, at the said then next assizes for the said county of Rutland holden at Oakham, in the said county of Rutland, in and for the said county, at a day and time now
*507] past, *was in due manner and by due course of law tried and acquitted of the premises in the said indictment charged upon him, by a jury of the said county of Rutland, and it was afterwards considered that the said now plaintiff should depart thereof without day; and that the said prosecution of the said now plaintiff for the said offence was duly ended and determined before the commencement of this suit, and that thereupon the said now plaintiff was afterwards discharged out of custody upon the said charge, fully acquitted thereof as aforesaid: by means of which said several premises the said now plaintiff had been and was injured in his name and credit, and had suffered great pain and anxiety of mind and body, and was prevented thereby from attending to his lawful affairs and business; and also by reason of the premises the plaintiff necessarily incurred large expenses in defending himself against the said prosecution and proceedings, and in relation to the premises and otherwise, and was and is thereby otherwise injured: Claim, 500*l.*

The defendant pleaded not guilty, whereupon issue was joined.

The now plaintiff was a farmer residing at Oakham, in the county of Rutland, and the now defendant was a seed-merchant and farmer also residing at the same place. In December 1858, the now defendant brought an action against the now plaintiff in the county court of Rutlandshire holden at Oakham, to recover a sum of money for goods supplied by the now defendant to the now plaintiff; and the now plaintiff, in answer to the last-mentioned claim, gave notice of a set-off to a larger amount for certain soil supplied to the now defendant by the now plaintiff in the year 1852; and, on the 8th of December, 1858, this last-mentioned action came on to be tried at the said county court at Oakham, before Miller, Serjt., the judge thereof, when the now plaintiff and
*508] *the now defendant were both sworn and examined as witnesses, and no other witnesses were called on either side. The now plaintiff did not on the trial of the last-mentioned action dispute his liability to the now defendant's claim therein, but relied on his set-off, and stated it was true. The now defendant in answer said,—"Why, that was settled between us years ago;" and that they had had a settlement of accounts years ago, and that the claim for this soil was settled; and that, knowing Fitzjohn to be a difficult person to deal with, he had taken care to have his name attached to the settlement at the time: and

the now defendant then produced his ledger, which contained on one side entries to the debit of the now plaintiff amounting to 23*l.* 4*s.* 4*d.*, and on the other side of the same sheet the words "Balanced by A/c 23*l.* 4*s.* 4*d.*," and also immediately above those words an entry in the words and figures following, that is to say,—"1853. November 7th. In this settlement all claims for soil and labour are balanced up to this time, by agreement with J. Fitzjohn,"—all, as he alleged, written by himself except the words "J. Fitzjohn," which he swore were in the handwriting of the now plaintiff, and that he wrote them in his presence.

The judge of the county court, who was called on this trial and examined as a witness by the defendant, said that he had looked at the entry and told the now plaintiff to look at it, and that he had to ask him once or twice before he could prevail upon him to look at it; that the now plaintiff at first turned his head away, but that he afterwards looked at the book and said it was not his handwriting; and that he the said county court judge then said to the now plaintiff,—"You had better take care; I have had to caution you before for your false statements;" that the now plaintiff denied the signature in a faint manner, and that he did not *speak so positively as at the present time; and that in consequence of his manner and of the proceeding he the said [*509 county court judge said to the now plaintiff, "You stand committed for perjury," and that he then required the now defendant to enter into recognisances to prosecute the now plaintiff, and that he also made and signed the following order and certificate under the statute 14 & 15 Vict. c. 190, s. 19:—

"At a county court held for the county of Rutland, at Oakham, the 8th day of December, 1858.

"Whereas, at a county court as aforesaid holden here this day before me the undersigned judge of the said court, a certain plaint in which John Draper Mackinder was plaintiff, and James Fitzjohn was defendant, came on to be heard and tried before me; and the said James Fitzjohn, being examined, and having given evidence vivâ voce according to the practice of this court in behalf of himself as defendant: And whereas it appears to me that the said James Fitzjohn in the evidence so given by him then has been guilty of wilful and corrupt perjury: And I therefore, in pursuance of the statute in such case made and provided, direct and order that the said James Fitzjohn be prosecuted for the said perjury, there appearing to me to be reasonable cause for such prosecution. Given under my hand and seal this 8th day of December, 1858.

"ROBERT MILLER."

The judge's certificate was as follows:—

"At a county court held for the county of Rutland at Oakham, this 8th day of December, 1858.

"To John Draper Mackinder, who has entered into a recognisance before me this day to prosecute one James Fitzjohn for wilful and corrupt perjury, and to whomsoever else it may concern:—

"I hereby certify, that, at a county court as aforesaid holden here this day before me the undersigned *judge of the said court, a certain plaint in which the said John Draper Mackinder was [*510

plaintiff, and the said James Fitzjohn was defendant, came on to be heard before me; and the said James Fitzjohn being examined, and having given evidence vivâ voce according to the practice of this court in behalf of himself as defendant, and it appearing to me that the said James Fitzjohn in the evidence so given by him was guilty of wilful and corrupt perjury,—I therefore, as judge of the court aforesaid, in pursuance of the statute in such case made and provided, ordered and directed that he the said James Fitzjohn should be prosecuted for the said perjury, there appearing to me to be reasonable cause for such prosecution. Given under my hand and seal this 8th day of December, 1858. "ROBERT MILLER."

The said county court judge also said that he adopted this course spontaneously, without any suggestion, and not merely in consequence of what took place before him, and that he did so partly from the now plaintiff's manner, and that he had no other evidence before him but that of the now plaintiff and the now defendant, and the entry in the book; and that he afterwards gave judgment in favour of the now defendant, for the amount of his claim.

The now defendant accordingly entered into a recognisance to prosecute the now plaintiff at the next assizes for the county of Rutland, and afterwards accordingly preferred before the grand jury of the said county of Rutland a bill of indictment against the now plaintiff for perjury committed by him at the said county court in his aforesaid evidence, and prosecuted the same at the next assizes at Oakham holden on the 1st of March, 1859, before Erle, J.; and the now plaintiff was then in due manner and by due course of law tried for and acquitted of the said *511] offence by a jury of *the said county; and the now plaintiff was thereby put to large expense in defending himself in the premises. The present action was then brought by the now plaintiff against the now defendant for the damages which he the now plaintiff had sustained by reason of the aforesaid prosecution.

The cause came on to be tried before Williams, J., and a special jury, at the assizes at Oakham on the 13th of July, 1859, when the now plaintiff was called; and several witnesses were called on his part, who stated that the signature "J. Fitzjohn" was not in their opinion in the handwriting of the now plaintiff; and one of the said witnesses said that he believed it to be the handwriting of the now defendant.

The now defendant was not called as a witness at the last-mentioned trial: and no other witness was called on his part.

The learned judge at the trial ruled that the action was not maintainable, but allowed the case to go to the jury on the assumption that it was: and, in summing up to the jury, he asked them if the now defendant procured the prosecution to be carried on without reasonable or probable cause and maliciously; and directed them, that, if they were of opinion that the now defendant, at the time he told the county court judge that the entry in the ledger produced was signed by the now plaintiff, was knowingly misinforming the county court judge, there was no reasonable or probable cause for the prosecution, and that the now defendant must have known that the now plaintiff was innocent: and, as to malice, he directed the jury, that, if they thought that the now defendant knew that he was saying that which was false, they could have

no doubt he was acting maliciously: and that the simple question was, whether the entry was signed by the now plaintiff, and whether the now defendant knew that it was not.

*The jury found a verdict for the plaintiff with 200*l.* damages; [*512 and the learned judge directed a nonsuit to be entered, and gave leave to the now plaintiff to move to enter a verdict for him with 200*l.* damages, if the Court of Common Pleas should be of opinion that the now defendant was liable.

In Michaelmas Term, 1859, a rule nisi was obtained accordingly, which was ultimately discharged: 8 C. B. N. S. 78 (E. C. L. R. vol. 98).

The case was argued in the Exchequer Chamber on the 30th of November, 1860, before Cockburn, C. J., Wightman, J., Martin, B., Bramwell, B., Channell, B., Hill, J., and Blackburn, J.

Lush, Q. C. (with whom was *Beasley*), for the appellant.—The prosecution of the plaintiff would have been clearly malicious but for the order of the judge; and the question is, whether the defendant, having by his malicious conduct misled the judge into the belief that the plaintiff had been guilty of perjury, and so induced the judge to bind him over to prosecute, can now be permitted to shelter himself under that obligation. [MARTIN, B.—It is settled that an action will not lie for perjury: can you, then, indirectly sue for the consequences of perjury? BLACKBURN, J.—It is clear that the defendant did not contemplate this as the consequence of his false evidence. All he contemplated was, the obtaining a verdict.] But for the recognisance, the defendant would have been liable in this action. Can he, then, set up as an excuse that which was obtained by his fraud and malice? [COCKBURN, C. J.—It was not upon the defendant's evidence only that the county court judge acted.] But for the defendant's perjury, the county court judge would not have made the order. [COCKBURN, C. J.—The defendant had his choice between forfeiting his recognisance and going on with the prosecution. If he thought fit to go before the grand jury *and give false [*513 evidence, might not that afford a cause of action against him?] In Dubois *v.* Keats, 11 Ad. & E. 329 (E. C. L. R. vol. 39), 3 P. & D. 306, to a declaration for maliciously and without probable cause procuring the plaintiff to be indicted at the Central Criminal Court for felony, it was held to be no answer that the defendant was bound over by recognisance to prosecute, if the jury believe that the defendant caused himself to be bound by making a charge maliciously and without probable cause before the magistrate who took the recognisance. It appeared there that the defendant had charged the plaintiff with the felony before a magistrate, who had held the plantiff to bail to appear at the session of the Central Criminal Court, and had bound over the defendant to prosecute; and that the defendant had accordingly appeared as prosecutor at the session of the Central Criminal Court, when the plaintiff was acquitted. Evidence was given to show that the charge from the first was malicious and without probable cause. The counsel for the defendant contended that he was entitled to a verdict, inasmuch as the declaration charged him in respect only of the prosecution at the session of the Central Criminal Court, which prosecution the defendant was compelled by the recognisance to carry on. Coleridge, J., told the jury, that, if they believed the recognisance to have been the result of a charge made before the magistrate maliciously and without probable

cause, the recognisance was no defence, and the plaintiff was entitled to a verdict. Upon a motion for a new trial, on the ground of misdirection, Lord Denman said: "It is supposed that a charge cannot be preferred before a grand jury maliciously, if the party be bound to prefer it, though the recognisance be obtained in consequence of his malicious proceeding. I have not the smallest doubt that a recognisance so obtained *514] does not justify *the party, or prevent his subsequent conduct from being malicious. Then it is said that the learned judge did not with sufficient precision put it to the jury whether the charge before the grand jury proceeded from malice or from the necessity under which the defendant was placed by the recognisance. I do not know that the judge was bound to put the question so pointedly. If the jury thought that the charge originated in malice, of which there was evidence, then, according to the view which I have taken of the first point, the plaintiff was entitled to recover." And Littledale, J., said: "As to the first point, many cases may be put in which it is a sufficient answer to a complaint like this, that the party was bound by recognisance to prosecute; for instance, if an unwilling party were bound over. But the recognisance would then furnish an answer for this reason only, that in such a case the plaintiff could not prove that the defendant was actuated by a malicious motive in making his charge before the magistrate. All the circumstances must be taken together and submitted to the jury, so that upon the whole they may judge whether the motive be malicious." [Cockburn, C. J.—That deprives the defendant of the protection derived from the recognisance; but it leaves the order of the judge. There, the defendant went to the magistrate with a view to carry out the malicious purpose he had in view. That does not quite meet the case of a man who is carrying on a prosecution in consequence of the order of a higher power. Byles, J.—Dolus circuitu non purgatur.] The defendant was a volunteer when he accepted the responsibility of prosecuting the plaintiff for the supposed perjury. [Channell, B.—The first part of the declaration is negatived by the evidence of the judge.] That may be thrown out of consideration. [Channell, B.—The second *515] part may not of itself amount *to a substantive cause of action.] The jury have found that what was done by the defendant was done maliciously and for the purpose of procuring the plaintiff to be prosecuted for perjury. [Cockburn, C. J.—You say that the defendant was not protected by the order when he went before the grand jury and got the bill maliciously and by false evidence?] Precisely so. [Blackburn, J.—The question is, did the defendant *cause* the prosecution?] Every step he took was a causing the prosecution. It was in his power up to the last moment to prevent the recognisance being entered into. At all events, he might have abstained from going before the grand jury.

Hayes, Serjt. (with whom was *White*), contrà.—This action is clearly not maintainable. The charge in reality amounts to this, that the defendant gave false evidence on the trial of the indictment. For this the defendant may be indicted, but no action will lie against him. This was distinctly decided in Reeves *v.* Smith, 18 C. B. 126 (E. C. L. R. vol. 86), where it was held that no action lies against a man for a statement made by him, whether by affidavit or vivâ voce, in the course of a judicial proceeding, even though it be alleged to have been made falsely and maliciously and without any reasonable or probable cause. In

giving judgment, Jervis, C. J., observes: "Mr. Brown says that the moment a witness swerves from the truth, an action lies against him at the suit of the party injured. What would be the consequence of that? Why, that you would be trying him for perjury; and, by the testimony of one witness in a civil suit, you would be convicting a man of a crime of which he could not be convicted in a court of criminal jurisdiction without the concurring testimony of two." So, in Henderson *v.* Bromhead, 4 Hurlst. & N. 569,† it was held by the Exchequer *Chamber that no action lies against a party who in the course of a [*516 cause makes an affidavit in support of a summons taken out in such cause, which is scandalous, false, and malicious, though the person scandalized, and who complains, is not a party to the cause." [COCKBURN, C. J.—Do not the facts amount to a malicious prosecution of an indictment, apart from the order? WIGHTMAN, J.—The preferring the bill before the grand jury may be the act of the county court judge: the supporting it by perjury is a very different thing. COCKBURN, C. J.—It is difficult to separate the two, and say that the defendant was guilty of the one, but not of the other. The defendant makes the order of the judge the means of doing a wrongful act to the plaintiff. The action depends upon the intention with which the bill of indictment was preferred.] The allegation as to preferring the indictment is negatived by the evidence of the county court judge. This sort of action has never been held maintainable except against one who sets the law in motion. [COCKBURN, C. J.—Does not the defendant here set the law in motion? What is the difference between this and the case of a charge preferred before a magistrate?] One who goes before a magistrate to prefer a charge sets the law in motion. [COCKBURN, C. J.—When the defendant saw that the consequence of his false evidence was that the county court judge committed the party for trial for an offence of which he knew him to be innocent, did not his silence amount to a repetition of his previous statement?] The charge which is made against the defendant here, is, that he falsely and maliciously and without reasonable cause *caused* the plaintiff to be indicted for perjury. The causing the plaintiff to be indicted here was the act of the judge. [COCKBURN, C. J.—If he makes the order a means of doing that which is dishonest and malicious, is not the defendant liable? *The act ceases to be the act of the judge [*517 when you introduce fraud.] For the reasons given by the majority in the court below, it is submitted that this action is not well brought.

Lush, in reply.—The only question is, whether the defendant did not maliciously use the process of the court for the purpose of subserving his own dishonest intent. It is said that he did not *cause* the plaintiff to be prosecuted, because he was acted upon by vis major. The order of the judge, however, did not compel him to support the prosecution by means of false testimony; and he might by forfeiting his recognisance have relieved himself from the necessity of giving it.

Cur. adv. vult.

There being a difference of opinion amongst the learned judges, their opinions were delivered seriatim, as follows:—

BLACKBURN, J.—I think in this case the nonsuit was right, and that the judgment of the court below ought to be affirmed.

There was evidence that the defendant had knowingly given false

testimony before the county court judge, with a view to make him believe that a forged receipt of the plaintiff was his genuine signature. The object with which that testimony was given, was, to procure the judgment of the county court judge in the defendant's favour, and, as a step towards that end, to cause the county court judge to believe that the counter testimony of the plaintiff was false: but there is no evidence that the defendant procured the county court judge to commit the plaintiff for perjury, or to make the order directing the defendant to prose-
*518] cute: *on the contrary, the defendant in all probability would have taken any step in his power to prevent the judge from causing this further inquiry, which he must have felt put him in a dangerous predicament.

The judge of the county court would not have directed the prosecution unless he had not only believed the defendant's testimony, but had also thought that there were other grounds for convicting the plaintiff; so that the order to prosecute was not caused entirely by the defendant's evidence; and, in so far as it was caused by that evidence, it was a consequence which he neither anticipated nor desired. I think therefore that he can in no sense be said to have procured that order: and, for the same reason, I think that I need not express any opinion on the very important and difficult questions suggested by my Brother Willes's propositions, "that the order ought not to aid the defendant,—first, because it was occasioned by his own contrivance and wrong,—secondly, because as a judicial act it is void, having been obtained by fraud on the court." I think the facts do not raise these questions; for, the order was not obtained by the defendant's contrivance and wrong, nor by fraud on the court; though it was, at least in part, an unexpected consequence of a mistake in the judge, produced by a wrong and fraud practised for a different object.

The order of the county court judge was made under the authority of an act of parliament giving him power to direct a witness to be prosecuted, and also to order any person he may think fit to enter into a recognisance conditioned to prosecute. I think that the person thus ordered to enter into a recognisance to prosecute has no option, and is bound to prosecute. I am inclined to think, that, if he took upon himself to absent himself, so that the prosecution failed, he would not only forfeit his recognisance,
*519] but might also be *indicted: see Rex v. Robinson, 2 Burr. 799. But, whether that be so or not, he would commit a breach of duty if he did not obey the direction of the judge, and prosecute. It would be very mischievous indeed, if the person bound over to prosecute were at liberty to set up his own judgment against that of the judge, and refuse to proceed because to him there seemed not to be reasonable and probable cause, though to the judge there did: and it would obviously be unjust to hold him liable to an action for prosecuting without reasonable and probable cause, unless he had such an option. It is like a constable executing the warrant of a justice; or the officer of a court executing process. The officer is protected, though the party procuring the process is not, as is stated in Moravia v. Sloper, Willes 34,—"There seems a plain reason for this; for, the inferior officer is punishable as a minister of the court, if he do not obey its commands; and it would be unjust that a man should be punished if he do a thing, and should be liable to an action if he does."

I quite agree, that, if the person acting under the order has himself

procured it maliciously and without probable cause, he is liable to an action for having so done: it would then be but one step in causing the prosecution maliciously and without probable cause; and that is all that is decided in Dubois *v.* Keats, 11 Ad. & E. 329 (E. C. L. R. vol. 39), 3 Per. & D. 306. It is true that Lord Denman in the course of the argument gave utterance to a general dictum, that a person could never be justified in preferring a charge which he knew to be false, merely because he was bound over to prosecute; and that dictum is not consistent with my argument. But Littledale, J., immediately qualifies that dictum by pointing out that the position was too general: and it is to be observed, that, in delivering judgment, Lord Denman is careful to confine himself to the case before *him:—"It is supposed that a charge cannot be preferred before a grand jury maliciously, if [*520 the party be bound to prefer it, *though the recognisance be obtained in consequence of his malicious proceedings.* I have not the smallest doubt that a recognisance *so obtained* does not justify the party, or prevent his subsequent proceeding from being malicious." And Littledale, J., points out, that, if the party had been bound over in invitum, he would not have been answerable, because it would have shown he did not maliciously "*go before the magistrate,*" or, in other words, institute the prosecution. My judgment in the present case proceeds, I have already said, entirely on the ground that I think there is no evidence to lead to the conclusion that the defendant *procured* himself to be bound over to prosecute: on the contrary, I feel no doubt that he was much alarmed when he found that the judge intended to have the matter further investigated, and would have been glad to stop it if he could. It is quite true that he could have stopped it by at once confessing himself guilty: it was his moral duty to do so, just as it would have been if the judge had ordered a third person to prosecute: but no action lies for the neglect of that duty of imperfect obligation. Then, when he was bound over and directed to prosecute, it seems to me clear that his legal duty was to obey the order, to prefer the indictment, and to give evidence before the grand jury. He ought to have given true evidence before the grand jury, and said that he was the perjured person, and not the accused. Perhaps the grand jury might have come to the conclusion that he had been bought off, and on other evidence have found the bill, notwithstanding, though it is most likely that the bill would not have been found unless the defendant had been guilty of a further perjury: and, as the only question now is, whether there was evidence for the *jury, it must be taken that the bill was found in consequence [*521 of the defendant's false evidence before the grand jury.

But, though false evidence is strong evidence of malice and want of reasonable cause, if the defendant were shown to be the person causing the prosecution, I do not think that an action lies against him for giving false testimony in support of a prosecution not procured by himself. No such action has ever yet been maintained; and I think the reasons given in Henderson *v.* Broomhead, 4 Hurlst. & N. 569,† and Revis *v.* Smith, 18 C. B. 126 (E. C. L. R. vol. 86), are strong to show that it will not lie.

My judgment in this case is therefore founded on two propositions,—first, I think that an action will not lie against a party for, in obedience to the order of a judge, conducting a prosecution directed and instituted

by the judge, though that party may know that there was no reasonable and probable cause for the prosecution; provided always, the order was not procured by the party, in which last case I think he may be said to have instituted and procured the prosecution, not otherwise,—secondly, I think that no action will lie for the consequences of perjury in the course of a prosecution not procured by the witness. And, if an action will not lie for either separately, I think that it will not lie for the two combined. Therefore, I think that the judgment should be affirmed.

Bramwell, B.—I think this judgment should be reversed. Had the action been for damages in respect of the preferring of the indictment only, that is to say, had the grand jury thrown the bill out, I think the action would not have been maintainable. Though the charge against the plaintiff was false (as must now be assumed), I think the defendant
*522] was bound to *prefer the indictment. Practically, it may be, he had the option of refusing to do so, on paying the penalty of his recognisance; yet I think a legal duty existed as much as in other cases where an act is prohibited or enjoined, with no other penalty for disobedience than a pecuniary one. Nor can I think the county court judge's order void. The fraud of the defendant was not directed to obtain it: and, even if it were, it seems impossible to suppose, that, had the county court judge bound over any one else, the order would have been void: if not, it ought not to be so considered though it bound the defendant himself. On this point I must, with great respect, entertain a doubt, because this action is not for damages in respect of the preferring of the indictment only, but also for the residue of the prosecution, and the damage consequent upon it.

It must be assumed that the defendant laid a case before the grand jury, false to his own knowledge, which caused them to find a true bill. For this I think an action maintainable. Why not? Where an action is maintainable in respect of the whole prosecution, including the preferring of the bill, it is in part maintainable for the subsequent stages and conduct of it,—then, why should it not be maintainable for those parts, even where it is not for the mere preferring of the bill? It is said this would be to hold it maintainable in respect of the evidence given by the defendant before the grand jury. I deny that. A prosecutor might give no evidence at all, and every witness called speak the whole truth, and nothing but the truth, and yet the prosecution be malicious. The case was put during the argument,—Suppose a man's servants on good ground charge a person with stealing, suppose the charge is bonâ fide made, and the master bound over to prosecute; suppose another servant afterwards discovers the property under circumstances
*523] *showing it was never stolen, and gives it to the master, who for a grudge nevertheless prefers an indictment, and suppresses the evidence of innocence;—would no action lie? I cannot doubt it would, and yet the prosecutor would have given no evidence, and all his witnesses would have been truthful; and, further, I think he would have been bound to prosecute. So I think here, that, though the defendant was bound to prefer the indictment, he was not bound, but the contrary, to procure its being found by the means he must have used; that, consequently, as to that part of the case, the order to prosecute does not protect him; that his act was malicious, viz. to avoid having to recant and confess he had sworn falsely; and so the action lies.

WIGHTMAN, J.—I am of opinion that the learned judge was right in nonsuiting the plaintiff, and that the action is not maintainable, notwithstanding the finding of the jury.

In order to maintain such an action as the present, there must be not only malice in the defendant, but want of probable cause. The jury have found that there was malice, and also that the defendant knew that the charge made in the indictment against the plaintiff was false in fact: but it also appeared that the defendant, when he preferred the bill, did so in obedience to the order of the county court judge, who, being of opinion that the plaintiff had been guilty of perjury, directed him to be prosecuted, and required the present defendant to enter into a recognisance to prosecute. The county court judge had authority to do this under the 19th section of the 14 & 15 Vict. c. 100, which enables him, if there appears to him to be reasonable cause for the prosecution of a person for perjury, in evidence before him, *to require any person he may *think fit* to enter into a recognisance to prosecute and give evidence. [*524

The county court judge appears to have ordered the prosecution spontaneously, and without any suggestion from the defendant or any one else. There was no evidence showing or tending to show that the defendant would of his own accord have preferred an indictment against the plaintiff. He could not decline the duty cast upon him by the county court judge, however reluctant he might be; and, as there was no evidence of express malice in this case, I do not see how he can be said to have acted maliciously in preferring an indictment which he was ordered by the county court judge to prefer under peril of forfeiting his recognisance, though he might know that the charge which appeared to the judge to be well founded was in fact wholly false. If, indeed, the defendant had himself in the first instance charged the plaintiff with perjury, and the recognisance he had entered into to prosecute had been the consequence of such charge, the case would have fallen directly within that of Dubois *v.* Keats, 11 A. & E. 329 (E. C. L. R. vol. 39), 3 P. & D. 306, and the action might have been supported, and the defendant could not shelter himself under the plea of acting under the compulsion of a recognisance by which he had directly caused himself to be bound. In the present case, however, the defendant has not otherwise caused the prosecution for perjury than by having himself given false evidence in the county court,—a cause too remote to sustain such an action as the present.

The county court judge was really the original prosecutor of the charge, and the person whom he ordered to enter into a recognisance to prosecute was only the nominal prosecutor. The judge might have ordered one of the officers of his court to enter a recognisance to prosecute, and have bound the defendant by recognisance to appear and give evidence in support of the *charge; in which case no action would have been maintainable against him for any statement which he made as a witness, however false and malicious, as appears clearly from the case of Revis *v.* Smith, 18 C. B. 126 (E. C. L. R. vol. 86), and the cases therein cited. For what the defendant did or said as a witness in the prosecution, he would not be liable to an action, though he might be liable as prosecutor of an unfounded charge, if he maliciously and without reasonable ground voluntarily preferred or caused [*525

the charge to be preferred. The defendant in the present case does not appear to have done either. The prosecution was entirely at the instance and by the order of the county court judge, which the defendant was bound to obey: and it would be strange if a person acting under such compulsion involuntarily, should be liable to an action for what he does under it, if he happens to know that the charge which he is ordered and obliged to prosecute is false and unfounded.

The nearest case to the present of which I am aware, is that of Dubois v. Keats, 11 Ad. & E. 329 (E. C. L. R. vol. 39), 3 P. & D. 306, to which reference has been made: but that case is clearly distinguishable from the present on the ground, already mentioned, that the defendant had in that case preferred the charge before the magistrate, and in consequence of that charge was in due course bound in a recognisance to prosecute.

I am therefore of opinion that this action is not maintainable, and that the nonsuit was right.

Cockburn, C. J.—This case comes before us on appeal from a decision of the Court of Common Pleas, in which the court refused to make absolute a rule nisi to set aside a nonsuit and enter a verdict for the plaintiff: which rule had been obtained on leave reserved by the learned judge who presided at nisi prius.

*526] I am of opinion that the decision appealed from was *erroneous, and that the plaintiff is entitled to have the rule made absolute to enter the verdict for him.

The declaration in the action complains that the defendant falsely and maliciously, and without reasonable or probable cause, caused and procured the judge of the Rutlandshire county court to direct the plaintiff to be prosecuted for perjury on certain evidence given by him before the said county court judge; as also that the defendant falsely and maliciously, and without reasonable or probable cause, indicted and caused the plaintiff to be indicted for perjury, and afterwards falsely and maliciously, and without reasonable and probable cause, prosecuted and caused such indictment to be prosecuted.

The facts were these:—The plaintiff having sued the defendant in the county court for a debt, the defendant pleaded a set-off, and alleged that the amount had been admitted as a settled account, to prove which he produced a memorandum purporting to bear the plaintiff's signature, which signature he swore to having himself seen the plaintiff write. The plaintiff, on the other hand, denied the fact, and swore that the handwriting was not his: but the judge, being dissatisfied with his manner, and having on previous occasions received an unfavourable impression from the plaintiff's manner of giving evidence, came to the conclusion that the plaintiff had sworn falsely, and not only decided the case against him, but committed him for perjury, and, under the 14 & 15 Vict. c. 100, s. 19, made an order for his being prosecuted, and bound over the defendant to prosecute. Accordingly, the defendant proceeded at the next assizes to prefer a bill of indictment against the plaintiff for perjury. Thereupon, a true bill having been found, the plaintiff was put upon his trial, when, evidence having been produced to prove that the handwriting of the signature was not his, he was acquitted.

*The jury on the trial of the present action having found for the plaintiff, it must be taken, for the present purpose, that the order of the county court judge for the prosecution of the plaintiff proceeded on the forgery and perjury of the defendant, and that the defendant entered on the prosecution with full knowledge of the plaintiff's innocence, and with the deliberate intention of furthering the prosecution and procuring the conviction of an innocent man by a renewal of his former perjury. And, as a true bill could not have been found, or a case to go to the jury have been made out, without a repetition of the defendant's former evidence, it must be taken that the defendant, both before the grand jury and on the trial, again produced the forged document and renewed the perjury of which he had before been guilty. [*527

Upon these facts, I am of opinion that the defendant is liable in this action. I do not feel it necessary to say that so much of the declaration as charges the defendant with having maliciously procured the order of the county court judge can be sustained, as it must be taken that the purpose of the defendant's perjury was, not to cause the plaintiff to be prosecuted, but simply to defeat the suit; but I am far from holding that it cannot. It is enough to say that it appears to me that, at all events, the action may be well maintained as to so much as charges the defendant with having maliciously and without probable cause preferred an indictment against the plaintiff, and prosecuted such indictment.

It is beyond dispute, that, independently of the order of the county court judge, the prosecution would under the circumstances have been malicious. Called upon to answer in damages for the injury inflicted by it on the plaintiff, the defendant, in order to avoid the consequences of a proceeding on the face of it otherwise *clearly wrongful and actionable, seeks to protect himself by showing that he acted under the order of the county court judge. I am disposed to concur with my Brother Willes, who dissented from the majority of the Court of Common Pleas, in thinking that it is not competent to the defendant to shelter himself under this order, seeing that the judge was induced to make it through his perjury and fraud. To suffer the judge to make such an order without informing him of the truth, and disabusing his mind of the error into which he had been led by wilful falsehood, was, as it seems to me, a fraud upon the judge, as well as a wrongful act towards the plaintiff: and I cannot bring myself to think that the defendant should be allowed to shelter himself under an order having its origin in his own falsehood, and issuing through his own fraud. [*528

The case of Dubois *v.* Keats, 11 Ad. & E. 329 (E. C. L. R. vol. 39), is an authority to show that the binding over in recognisances by a superior authority will not under all circumstances afford an answer to an action for a malicious prosecution. And, though it is true that in that case the defendant had by a malicious and unfounded charge before the magistrate intentionally procured himself to be bound over to prosecute,—a circumstance which does not exist here,—yet I think the same principle may well be applied where a man, by his own perjury and fraud, and by an abuse of the confidence of the court, has led to his being appointed to prosecute one whom he knows to be innocent, when by a disclosure of the truth he might at once have prevented such a result. I doubt, therefore, whether we ought not to go the length of holding that the defendant, who, seeing that this order to prosecute was

about to result from his own fraud and perjury, did not disabuse the mind of the judge, must be responsible for the order itself, as much as though he had committed the perjury in order to procure it to be made.

*529] *Without, however, going thus far,—assuming, that the defendant ought not to be held responsible for the act of the judge in directing the prosecution of the plaintiff, I am still of opinion that the defendant is liable in this action. It being clear that the preferring the bill of indictment would otherwise have been malicious and unjustifiable, it appears to me that the defendant is not relieved from responsibility by his having been bound over to prosecute. It is a mistake to say that there was any order made by the judge which left the defendant no alternative but to obey, or anything done which rendered him the mere passive instrument of a superior authority. All that a judge is authorized by the 14 & 15 Vict. c. 100, s. 19, to do, when a person appears to him to have committed perjury, is, "to direct that such person shall be prosecuted," and "to require any person he may think fit to enter into a recognisance conditioned to prosecute or give evidence against the person so directed to be prosecuted." The only consequence to a person entering into such a recognisance from failing to perform the condition is the forfeiture of the recognisance. Though there may be a duty to society in a person aggrieved by the criminal act of another to bring the offender to justice, no such legal obligation is imposed by law even upon the party aggrieved, still less upon a stranger; and the only mode in which a private individual can be made to take upon himself the burden of prosecuting an offender, is, by compelling him to submit to be bound in a pecuniary penalty, to be forfeited if he fails to comply with the condition. But legal obligation there is otherwise none. No one ever heard of an indictment or other proceeding against a party for not appearing to prosecute after being bound over. The alternative of compliance with the terms of the recognisance is simply (as was

*530] pointed out by Lord Denman in Dubois *v.* Keats) the pecuniary loss involved in the forfeiture of the recognisance. Lord Denman in that case goes on to ask, "Can a man excuse the preferring a charge against a fellow-subject which he knew to be false, merely because he would otherwise have suffered pecuniary loss by forfeiting his recognisance?" That question again presents itself in the present case; and I cannot imagine that it admits of any other than a negative answer. It cannot be that a mere liability to pecuniary loss can justify a man in indicting and endeavouring to convict one whom, having himself committed the crime which he seeks to fix on him, he knows to be innocent.

But the main argument relied on in favour of the defendant, is, that he did not originate the proceedings, or, as the phrase is, set the law in motion,—the county court judge having, without any complaint by the defendant with a view to that result, of his own head directed the prosecution,—and the defendant's position is compared to that of a stranger unwillingly bound over, as put by Littledale, J., in Dubois *v.* Keats. I do not feel at all pressed by this argument. No doubt, under ordinary circumstances, where the question of malice is still open, the fact that some one else set the law in motion would be conclusive in favour of the defendant; or, if the existence of reasonable and probable cause were in dispute, the fact that a judge or magistrate had spontaneously bound over the defendant would go very far to show that the prosecution was a proper one.

But this reasoning can have no application where the maliciousness of the prosecution and the absence of probable cause are necessarily implied in the fact that we have the guilty man pursuing the innocent. To say, in any other view than the one I have just been putting, that a man's liability to an action for a malicious prosecution depends on his *having first set the law in motion, appears to me untenable in principle and unwarranted by authority; and assuredly nothing short of the most conclusive authority would induce me to assent to such a position. In my opinion,—an opinion I shall continue to entertain unless corrected by higher authority,—a prosecution, though in the outset not malicious, as having been undertaken at the dictation of a judge or magistrate, or, if spontaneously undertaken, from having been commenced under a bonâ fide belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres malo animo in the prosecution, with the intention of procuring per nefas a conviction of the accused. Take, for instance, the case of a prosecutor, who, after the commitment of a prisoner, and before going before the grand jury, chanced to discover the clearest proof of the prisoner's innocence, and yet went on with the indictment and prosecution, suppressing the newly-ascertained facts, and supporting the case against the prisoner by evidence either absolutely false or rendered so by the suppression of facts which would have shown the innocence of the accused. Can it be said that to prefer an indictment under such circumstances, to be followed up by such a course of proceeding as I have referred to, would not be a malicious prosecution, for which the man whose life or liberty had been put in peril by it should have a remedy by civil action? And I may here observe, in passing, that, so far as the defendant is concerned, the prosecution commences with the preferring of the indictment. Having been bound over to prosecute, to prefer an indictment is for him the first step of the prosecution. The plaintiff complains that he preferred the indictment maliciously *and without probable cause. Is this made out? The facts are, that he preferred the indictment with a knowledge of the innocence of the accused, and with the settled intention of establishing the charge, not only by a suppression of the truth, when a disclosure of the facts would at once have led to the throwing out of the indictment or the acquittal of the prisoner, but also by false evidence of the most heinous character. I cannot believe, that, under our law, of which it is the boast that it leaves no wrong without a remedy, redress can be denied in respect of so flagrant an injury, on the feeble ground that he who has thus abused the law for the purposes of iniquity, was not the first to set it in motion. [*531 [*532

Two other points are made in favour of the defendant, but neither of them appears to me to present any serious difficulty. It is said that the defendant, not having been actuated by any personal enmity towards the plaintiff, or by a desire to injure him, but having simply acted in obedience to the requirements of the recognisance, cannot be liable in an action to maintain which malice is essential. It seems to me that there is nothing in this argument. Where a wrongful act is done with the intention of bringing about the consequences naturally flowing from it to the injury of another, the act is necessarily malicious in contem-

plation of law; nor will it be an answer to a civil action that the party doing the wrongful act was actuated by his own interest, without any personal desire to injure the other party, or even acted under a mistaken sense of duty. I cannot entertain a doubt that to indict an innocent man on a charge false to the knowledge of the party preferring it, no matter what may have originally been the motive, must necessarily be malicious.

Lastly, it is said that this action is substantially an action brought in respect of the perjury committed by *the defendant to the plaintiff's prejudice, and that thereupon two objections arise,—first, *533] that no action will lie for an injury arising from perjury committed by a witness,—secondly, that, if such an action as the present could be maintained, the effect would be that a man could be made responsible for perjury on the evidence of a single witness, contrary to the rule of evidence which prevails in cases of perjury. Now, if the position on which these objections are based,—viz., that this action is brought in respect of the perjury committed by the defendant,—were well founded, I, for one, should think it necessary to consider further before I consented to extend the immunity from civil consequences afforded to perjury in respect of defamation, to other instances of civil injury directly brought about by perjury committed with the intention of producing it. Still less should I be disposed to apply to a civil action a rule of evidence which has hitherto been confined to criminal cases,—a rule which, like so many other rules of evidence, had its origin in unenlightened times, and the policy and reason of which are, in my humble judgment, as to civil rights at least open to very serious question. But it is unnecessary to enter further into these points. The short answer is, that this is neither in form nor substance an action in respect of the perjury committed by the defendant to the plaintiff's damage. It is an action for preferring an indictment and carrying on a prosecution against the plaintiff on a charge which the defendant knew to be untrue, and which he knew could only be supported by perjured testimony. The perjury only comes incidentally into question as showing that the whole proceeding was malicious and destitute of any pretence of probable cause.

I can only say that in my opinion it would be a lamentable reproach to our law if a claim for redress *for so grievous a wrong could *534] be defeated by legal difficulties of a purely technical character. In my judgment the action may be well maintained under the circumstances; and I am of opinion that the nonsuit should be set aside, and a verdict entered for the plaintiff for the damages assessed by the jury.

My Brother Channell concurs in this judgment.

Judgment reversed.

SWEETING v. PEARCE.

The plaintiff, a shipbuilder in London, employed one W., an insurance-broker, to effect a policy upon a ship at Lloyd's, and, after the happening of a loss, gave W. the ship's papers for the purpose of enabling him to adjust the loss with the underwriters. The policy was effected in W.'s name, and he retained possession of it. An adjustment having taken place, the loss was settled,—in accordance with a usage prevailing at Lloyd's, which was found to be generally known to merchants and shipowners, but which the jury found was not known *to the plaintiff*, who had merely left the policy in W.'s hands for safe custody,—by the underwriter

setting off the amount payable by him upon the policy against the balance due to him from the broker for premiums on other policies effected by him:—

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that, assuming that the plaintiff was estopped from denying that the broker had authority to receive the amount due from the underwriter on the policy *in money*, he was not bound by the usage, and, consequently, that he was entitled to recover the amount of the policy against the underwriter, notwithstanding such settlement.

THIS was an action on a policy of insurance, for a total loss. The pleadings and facts are fully stated, 7 C. B., N. S. 449 (E. C. L. R. vol. 97). The substance of the case was as follows:—

The plaintiff, a ship-builder in London, employed one W., an insurance broker, to effect a policy upon a ship at Lloyd's, and, after the happening of a loss, gave W. the ship's papers, for the purpose of enabling him to adjust the loss with the underwriters. The policy was effected in W.'s name, and he retained possession of it. An adjustment having taken place, the loss was settled,—in accordance with a usage prevailing at Lloyd's, which was found to be generally known to merchants and shipowners, but which the jury found *was not known *to the plaintiff*, who had merely left the policy in W.'s hands for safe [*535 custody,—by the underwriter setting off the amount payable by him upon the policy against the balance due to him from the broker for premiums on other policies effected by him.

A verdict having been entered for the plaintiff, subject to a motion to enter it for the defendant, the court upon the argument of the rule held, that, although the plaintiff was estopped from denying that the broker had authority to receive the amount due from the underwriter on the policy *in money*, he was not bound by the usage, and, consequently, that he was entitled to recover the amount of the policy against the underwriter, notwithstanding such settlement.

The defendant appealed against this decision, and the case was argued before Wightman, J., Martin, B., Bramwell, B., Channell, B., and Hill, J., by

Bovill, Q. C., and *Hannen*, for the appellant, who substantially relied upon the arguments urged and the cases cited in the court below.

Montagu Smith, Q. C., contrà, was not called upon.

WIGHTMAN, J.—I do not think it necessary to say anything on the point as to Walton's authority to receive the amount due from the underwriters on the policy, for I am of opinion that the court below were right in the conclusion to which they came on the other point, viz., that, assuming that Walton, the insurance-broker, was employed to collect and receive the money due on the policy, he ought to have received it in money, and was not warranted in setting it off in account between himself and the underwriter, according to the usage of Lloyd's, of which the plaintiff was found to be wholly ignorant; and that such setting off in account was not *a discharge by the underwriter of the plaintiff's claim. Such a usage or custom is, in effect, without the [*536 consent or knowledge of the principal to substitute the broker,—who in this case turned out to be insolvent,—as a new debtor to him in the place of the underwriter. Primâ facie, the authority to receive money would be to receive payment in cash. The usage set up hardly appears to be reasonable, unless the principal knows of it, and assents to the settlement of his claim upon that footing. It has been contended that the broker was authorized to act according to the usage of Lloyd's,

whether the principal knew of it or not: but, in Gabay *v.* Lloyd, 3 B. & C. 793 (E. C. L. R. vol. 10), 5 D. & R. 641 (E. C. L. R. vol. 16), it was laid down that a usage of Lloyd's could not be taken to be a general usage of the trade of London, but only the usage of one house, and was not binding on a party who effected a policy there, but was ignorant of the usage. And in Scott *v.* Irving, 1 B. & Ad. 606 (E. C. L. R. vol. 20),—which is directly in point,—Lord Tenterden says that a usage to substitute another person as debtor to the principal can only bind those who have notice of it, and have consented to be bound by it. That seems a reasonable proposition. The general notoriety of a custom may in many cases be evidence that the person had knowledge of it. But here it is expressly found that the plaintiff had no knowledge of the usage in question. I therefore think that the decision of the Court of Common Pleas was right, and that the plaintiff was not bound by this settlement in account between Walton & Co. and the defendant.

Martin, B.—I am of the same opinion, but upon more simple and narrow grounds. The material facts are these:—The plaintiff (not a member of Lloyd's) employed brokers called Walton & Co. to effect an
*537] insurance upon the ship Caroline. They did so at *Lloyd's, and the defendant, who is a member of Lloyd's, underwrote the policy for 50*l.* The policy was left by the plaintiff with Messrs. Walton & Co. for safe custody, and at this period, in my opinion, the first employment by the plaintiff of Messrs. Walton & Co. terminated. The Caroline was afterwards lost; and, in October, 1858, the plaintiff brought to the office of Messrs. Walton & Co. the papers relating to the loss, and delivered them to Messrs. Walton in order to have it adjusted, and (for the purposes of the present judgment it is to be taken) to receive payment from the underwriters. In my opinion the true question in this case is, what was the authority given by the plaintiff to Messrs. Walton *upon this occasion:* and, if there was evidence to go to the jury, it was a question of fact for them; and if they upon the evidence had found that the defendant had settled the loss in a manner warranted by the authority *then given*, I think the defendant was entitled to succeed.

What occurred afterwards was in substance this:—The loss was adjusted at 96*l.* 13*s.* 9*d.* per cent., and the sum payable by the defendant, amounting to somewhat less than 50*l.*, was placed to his debit by Messrs. Walton in their books, in an account current between them. The defendant placed the like sum to the credit of Messrs. Walton in his books, and afterwards, and before the end of the year, gave them fresh credit for premiums to an amount exceeding 50*l.* This account was settled at the end of the year, and the balance was in favour of the defendant; and this continued until Messrs. Walton stopped payment on the 23d of January, 1858. A credit-note in the usual form was sent to the plaintiff by Messrs. Walton dated the 6th of November, 1857, and the net amount of the settlement (2821*l.* 10*s.*) was stated to be due on the 5th of January, 1858.

*538] *It seems to have been admitted, on the part of the plaintiff, that there was an usage at Lloyd's to settle the loss between the broker and the underwriter in the manner in which this loss was settled: and the jury found that this usage was generally known to merchants and shipowners who effected insurances. It was admitted by the defendant that the plaintiff was ignorant of this usage, and that he did not

intend Messrs. Walton to receive the money from the underwriters. The only contention on behalf of the defendant before the court below and before us (and upon the statement of the case there could be no other) was, that the usage of Lloyd's operated as a rule of law, or as a term of a contract into which the plaintiff had entered, and that he was absolutely bound by it as a matter of law. For the reasons given by my Brother Wightman, and by the judges of the court below, I am clearly of opinion that he was not so bound, and that the judgment of the court was right and ought to be affirmed.

I desire to state that I express no opinion whether it was essential, in order for the defendant to discharge himself as against the plaintiff, that the payment to Messrs. Walton should have been in money. There was a case of Butterworth *v.* Cotesworth, not reported, which was argued by my Brother Crompton and myself whilst at the bar, in the Court of Exchequer. The question was, whether an alleged payment made by the defendant, a mercantile house in London, to a mercantile house in Manchester, of the proceeds of goods consigned by the plaintiff for sale in South America, was a good payment as against the plaintiff. It was stated in the special case that the defendant in London and the house in Manchester had business transactions together which led to payment being made by each to the other, and that there was an *account current between them; that the course of business was, for the [*539 house paying to enter the amount to be paid to the credit of the other in the account current in their books, and advise it, and for the other house to enter the amount to the debit of the paying house in the account current in their books. The alleged payment in question was made in this way. The court,—Lord Abinger and Lord Wensleydale being members of it,—upon the case, by which they were empowered to draw inferences of fact, were clearly of opinion that it was a good payment as against the plaintiff, and that it amounted to the same thing as if the London house had sent down the cash to Manchester, or caused payment to be made by a banker there. In strictness, however, I think the question in that case was one of fact and not of law: and, upon the point in the present case, I entertain no doubt that the judgment of the court below was right.

Crompton, J.—I am of the same opinion. I should be sorry to interfere with the decisions,—such as Brown *v.* Byrne, 3 Ellis & B. 703 (E. C. L. R. vol. 77), and others of the same kind,—which show that customs of a particular trade may be imported into and form part of the bargain, where the usage is a reasonable one. But it has been settled by a series of cases, that this custom of Lloyd's ought not to prevail so as to affect a person who is ignorant of it. It would be a very inconvenient state of things if particular customs existing in different places should be binding on all persons unacquainted with those customs, who should happen to deal at those places. In Bayley *v.* Wilkins, 7 C. B. 886 (E. C. L. R. vol. 62), Maule, J.,—who was a very great authority in such cases,—says: "Scott *v.* Irving, 1 B. & Ad. 605 (E. C. L. R. vol. 20), is the last of a series of cases, beginning with Russell *v.* Bangley, 4 B. & Ald. 395 (E. C. L. R. vol. 6), which went upon the ground of the *unreasonableness of paying the debt of one with the money of another, as was said by the court in Todd *v.* Reid, 4 [*540 B. & Ald. 210 (E. C. L. R. vol. 6)." It seems to me that the usage

contended for here, which permits the underwriter to set off the loss in account with the broker, and so to discharge himself from the claim of the principal, though the latter is ignorant of the custom, is unreasonable.

BRAMWELL, B.—I am of the same opinion. It has been argued that this custom is part of the original contract: but it has been rightly stated by my Brother Martin, that it has to do with something which arises after the contract. If it were supposed to be embodied into the contract, the contract would be one with an infinite variety of contingencies. It would be a contract by the underwriter to pay the principal himself if there were a loss, and if he asked for the money; and, if he did not, to set it off in account with the broker, if the underwriter had a claim against the broker; and possibly a dozen different contingencies might be made out. It is, in truth, not a custom affecting the contract, but one affecting the mode in which the contract is to be fulfilled. I think with my Brother Martin that this is a question of authority. What, then, is the authority which Messrs. Walton had from the plaintiff? The legal presumption of authority given to a person who is to receive satisfaction for another for a money demand, is, that he is to receive it by payment of money only. It is also a rule of good sense. The presumption, then, here is, that Messrs. Walton were to receive satisfaction by payment of money. The custom set up is, that the persons who are by legal presumption to receive in money, and in money only, are not to receive in money. The custom therefore is in
*541] contradiction to *the authority given to the agents by their principal. It is a custom not to do the thing which the law implies they are to do; that shows it to be unreasonable. There is a great distinction between this and the cases which have been relied upon for the defendant. If I set a man generally to do a thing, a custom may well apply to regulate the mode of doing it. Thus, with regard to usages of the Stock Exchange, which have been referred to, if I tell a broker to purchase such and such stock, I impliedly engage him to deal upon terms upon which he can deal, that is, according to the usages of the place. If the tenor of my authority is, to exclude the operation of any custom, I give him no authority to act according to the custom; but, if the authority I give is consistent with the custom, then the custom comes into operation. Thus, in the case before us, when the plaintiff says to the broker, "Receive payment of the loss," that means, "Receive it in money, and not otherwise." Mr. Arnould, in his work on Marine Insurance, 2d edit. p. 81, says: "It might have been considered not a very violent presumption that all parties resident in this country employing brokers to effect policies for them in the common course of business, should be considered to have done so with reference to the usages established at Lloyd's." I beg leave to say that I think it would have been an unreasonable presumption. I can well understand, if a man who knows of this usage of Lloyd's gives his policy to the broker, with instructions to do the needful, a jury might well find that he authorizes the broker to do the needful according to the custom. Probably Mr. Arnould meant no more than that. But it would be a question for the jury in each case whether the presumption that the authority to receive payment in money was rebutted by the principal's knowledge of the custom.

Here I think the jury could not find that *the plaintiff authorized the broker to act according to the custom, he being wholly ignorant of it. There was, therefore, no ground for supposing that in the mind of the plaintiff any intention existed that Messrs. Walton should set off the loss in account with the underwriters. This custom, in truth, goes not to say how the presumed authority to receive payment in cash is to be exercised; but that it should not be exercised at all. [*542

CHANNELL, B.—I entirely agree with the rest of the court in thinking that the judgment in this case should be affirmed. So far as the matter rests on authority, the case of Scott *v.* Irving, 1 B. & Ad. 605 (E. C. L. R. vol. 20), is precisely in point in favour of the plaintiff. Applying the principle of that case and of Todd *v.* Green, 4 B. & Ald. 210 (E. C. L. R. vol. 6), and of Gabay *v.* Lloyd, 3 B. & C. 793 (E. C. L. R. vol. 10), 5 D. & R. 641 (E. C. L. R. vol. 16), I think the plaintiff is not bound by the custom, and is entitled to recover. The case of buying shares in a particular market through a broker is very distinguishable, upon the grounds already mentioned by some of my learned Brothers.

HILL, J., concurred. Judgment affirmed.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Hilary Term,

XXIV. VICTORIA. 1861.

The Judges who usually sat in banc in this term, were,—

ERLE, C. J. WILLES, J.
WILLIAMS, J. KEATING, J.

BATCHELLOR *v.* LAWRENCE and Others.

A., who was jointly liable with nine other persons, having been taken under a ca. sa., paid the entire debt:—Held, that he was entitled, by virtue of the 5th section of the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, to an assignment of the judgment; and that, in an action against the judgment-creditor to enforce such assignment, a plea that the judgment had bein satisfied by payment by A. after he had been taken in execution under it, was no answer.

THE declaration stated, that, before the committing of the grievances thereinafter mentioned, the plaintiff became liable jointly with one Thomas Gray, William Davies, Edwin Chance, James Freeman, George Sharp, Joseph Odell, Thomas Hunt, Harry Word Astbury, and Jonah Milner, to pay to the defendants the sum of 21*l.* 5*s.* 1*d.*; that, being so liable, the defendants, on the 28th of March, 1860, in the Mayor's Court
*544] of *London, by the consideration and judgment of the said court, recovered against the plaintiff and the said Thomas Gray, William Davies, Edwin Chance, James Freeman, George Sharp, Joseph Odell, Thomas Hunt, Harry Ward Astbury, and Jonah Milner, the sum of 30*l.*, together with 8*l.* 4*s.* 2*d.* for costs of suit, amounting in the whole to the sum of 38*l.* 4*s.* 2*d.*; that the defendants afterwards issued execution against the plaintiff on the said judgment for the sum of 29*l.* 9*s.* 3*d.*, and the plaintiff was forced and obliged to pay and did pay the said sum of

29*l.* 9*s.* 3*d.* for which judgment had been so recovered as aforesaid; that the plaintiff thereupon became entitled to have the said judgment assigned to him, in order to obtain from the said Thomas Gray, William Davies, Edwin Chance, James Freeman, George Sharp, Joseph Odell, Thomas Hunt, Harry Ward Astbury, and Jonah Milner, their just proportion of the same; and that the plaintiff afterwards, and before this suit, requested the defendants to assign such judgment to him, for the purposes aforesaid, and did everything on his part, and everything necessary happened, to entitle him to have such assignment; and that the defendants refused to assign the same.

The defendants pleaded, that, before the plaintiff paid the said sum of 29*l.* 9*s.* 3*d.*, or any part thereof, as in the declaration mentioned, and while the said judgment was wholly unsatisfied, they the defendants, for having execution of the said judgment, sued and prosecuted out of the said Mayor's Court of London a writ called a capias ad satisfaciendum, being the said execution in the said declaration mentioned, upon the said judgment, against the said Thomas Gray, Edward Stratton Batchellor (the plaintiff), William Davies, Edwin Chance, James Freeman, George Sharp, Joseph Odell, Thomas Hunt, Harry Ward Astbury, and *Jonah Milner, directed to Christopher Fitch, serjeant-at-mace, [*545 or to any other serjeant-at-mace, &c., whereby the said serjeant-at-mace was commanded to take the said Thomas Freeman, the said Edward Stratton Batchellor (the plaintiff as aforesaid), William Davies, Edwin Chance, James Freeman, George Sharp, Joseph Odell, Thomas Hunt, Harry Ward Astbury, and Jonah Milner, if they should be found within the liberties of the city of London, and them safely keep so that the said serjeant-at-mace, &c., might have their bodies there in court without delay, to satisfy the said defendants as well a certain debt of 30*l.* which the said defendants lately in the Queen's Majesty's court holden before the mayor and aldermen in the chamber of the Guildhall of the said city of London recovered against the said Thomas Gray, the said Edward Stratton Batchellor (the plaintiff as aforesaid), William Davies, Edwin Chance, James Freeman, George Sharp, Joseph Odell, Thomas Hunt, Harry Ward Astbury, and Jonah Milner, and also 8*l.* 4*s.* 2*d.*, which in the said Queen's Majesty's court before the said mayor and aldermen, in the chamber of the Guildhall of the said city, were adjudged to the said defendants for their damages sustained as well by detaining the said debt as for their costs and charges about their suit in that behalf expended; which said writ, before the delivery thereof to the said serjeant-at-mace, &c., to be executed, as thereinafter mentioned, was duly endorsed with a direction to the said serjeant-at-mace, &c., requiring him to levy the sum of 29*l.* 9*s.* 3*d.*; and which said writ so endorsed as aforesaid was afterwards delivered to the said serjeant-at-mace, &c., to be executed in due form of law; by virtue of which said writ the plaintiff, being found within the said liberties of the said city of London, was arrested by the said serjeant-at-mace, &c., and taken by his body, and then, by virtue of the said *writ, and of the said endorsement so made thereon as aforesaid, was kept and detained in [*546 custody in execution for the said sum of money so endorsed on the said writ as aforesaid; and further, that the plaintiff so being kept and detained in custody as aforesaid, and not otherwise, paid the said sum of 29*l.* 9*s.* 3*d.*, endorsed on the said writ as aforesaid, which was the

said payment in the declaration mentioned, and was thereupon discharged from custody by the said defendants, and the said judgment thereupon became and was wholly satisfied and discharged.

Demurrer and joinder.

Grant, in support of the demurrer.—The declaration is framed on the 5th section of the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, which enacts that "every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, *whether such judgment*, specialty, or other security *shall or shall not be deemed at law to have been satisfied by the payment of the debt* or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such *action or other proceeding by him: Provided always that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable." The plaintiff, having paid the entire debt, is, within the very terms of the enactment, entitled to have the security assigned to him. The fact of the judgment having been in one sense satisfied clearly affords no answer to the action: Cattlin *v.* Kernott, 3 C. B. N. S. 796 (E. C. L. R. vol. 91).

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C. Wood, contrà.—This is not a judgment within the meaning of the 5th section of the statute. The debt having been satisfied, the judgment is no longer a "security;" and the statute evidently contemplates judgments which are *securities*. Its object, as was said by Vice-Chancellor Kindersley in Brandon *v.* Brandon, 28 L. J. Ch. 150, was, to enable a surety to have the benefit of those equities, of those securities, which the creditor was entitled to. Here, the judgment was directly satisfied by the taking, not by payment. The judgment the assignment of which was contemplated, is, some collateral judgment against a third person, which the creditor held as a security, and had not enforced. There is nothing in the language of the statute to make it apply to the assignment of a judgment, where, as here, the person requiring it is a co-defendant. This is not a judgment which the present plaintiff could enforce. [WILLIAMS, J.—The principle of the statute seems to me to be this, that, where a surety pays the entire debt, he is to be allowed to have all the advantage of any securities which the creditor has against the principal, notwithstanding he has satisfied the claim: see Copis *v.* Middleton, Turn. & Russ. 229; *Jones *v.* Davids, 4 Russ. 277. Here, the plaintiff could not sue his co-debtors upon the judgment.] This was not a security at the time the assignment was asked for. It is a thing which was exhausted and gone. Throughout the

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section, a distinction is drawn between a "co-debtor" and a "surety." Payment by a *surety* is not to be pleadable in bar to an action by him; but there is nothing to prevent payment by a *co-debtor* being so pleaded. Whatever may be surmised as to the intention of the legislature, the court cannot supply words which they have omitted: Underhill, app., Longridge, resp., 29 Law J., M. C. 65. It may be conceded that a collateral judgment falls within the section; but there is nothing therein to point to a joint judgment. The 16th section of the 1 & 2 Vict. c. 110, provides, that, "if any judgment-creditor who under the powers of this act shall have obtained any charge or be entitled to the benefit of any security whatsoever, shall afterwards, and before the property so charged or secured shall have been converted into money or realized, and the produce thereof applied towards payment of the judgment-debt, cause the person of the judgment-debtor to be taken or charged in execution upon such judgment, then and in such case such judgment-creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly." The defendants, therefore, are asked to assign a thing which is absolutely worthless.

Grant was not called upon to reply.

ERLE, C. J.—I am of opinion that our judgment must be for the plaintiff. The plaintiff was a co-defendant with nine others in an action brought against them by the now defendants for the recovery of a debt, and the *plaintiff, having been taken in execution upon the judgment obtained in that action, satisfied the debt and costs by payment. Now, the law is, that a co-defendant in an action ex contractu paying the whole debt, is entitled to contribution from the others. But, to accomplish that a very complex course of litigation was necessary, each co-defendant being liable individually to contribute rateably. To remedy this inconvenience, the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 5, intended, as it seems to me, to provide for all cases where one has paid the whole debt for which several are jointly liable, and to give a facility to the party so paying for enforcing contribution from the others. I am of opinion that the words of the statute extend to co-defendants, as they are clearly within the mischief intended to be remedied thereby. The first part of the section speaks of two descriptions of persons,—first, one who is simply a *surety* for the debt or duty of another,—secondly, of one who is *liable with another* for any debt or duty. Now, each defendant in an action ex contractu is liable with the others for the debt. The section then proceeds to enact, that, if such surety or person liable shall pay such debt or perform such duty, "he shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or any co-surety, *co-contractor*, or *co-debtor*, as *the case may be, indemnification for the advances made and loss sustained by the person who shall

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have so paid such debt or performed such duty." And the section goes on to enact that "such payment or performance so made by such *surety* shall not be pleadable in bar of any such action or other proceeding by him: Provided always that no co-surety, *co-contractor*, or *co-debtor*, shall be entitled to recover from any other co-surety, *co-contractor*, or *co-debtor*, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned persons shall be justly liable." The defendants (who were plaintiffs in the original action) held a judgment in an action brought by them for the recovery of a debt due from the now plaintiff and certain other persons, which judgment the now plaintiff has satisfied by payment; and he claims to have that judgment assigned to him, in order to facilitate him in obtaining contribution from the other defendants. This the statute says he is entitled to, "whether such judgment shall or shall not be deemed at law to have been satisfied by payment of the debt." Mr. *Wood* insists that the defendants are not compellable to assign this judgment, because, being satisfied and gone, no remedy further can be had against anybody under it. It seems to me, however, that the statute has distinctly said, that, whether the judgment shall or shall not be deemed at law to have been satisfied by the payment, nevertheless the creditor shall when paid assign it to any one of the co-defendants by whom the payment is made, in order that he may obtain indemnification from the parties who were jointly liable with him. That that is the meaning of the statute I have no doubt: and for aught I know, after he has obtained the assignment, the party who has paid the debt may issue executions upon the judg-
*551] ment against *the other parties, and so enforce contribution from each of them. It seems to me that the very object of the statute was to give the co-surety or co-debtor a prompt and efficacious remedy for obtaining such contribution. Much of the argument urged by Mr. *Wood* was rested upon the provision in the statute that "such payment or performance so made by such *surety* shall not be pleadable in bar of any such action or other proceeding by him," which shows, as he contends, that the statute only intended to apply to payments made by a surety, and not to those made by a co-defendant. But I think the whole tenor of the section discountenances that construction: it is altogether at variance with the apparent intention of the legislature. By holding the statute to apply to a case like this, we do no violence to its language. In one sense, a co-defendant who pays the whole debt stands in the same position and is clothed with the same rights as a co-surety. As a co-surety he might sue his companions, who may in law be assumed to have requested him to pay their portions of the joint debt. Upon the fair and proper construction of the statute, therefore, I am of opinion that the case of a co-defendant is within its words; that it was the duty of the defendants to assign the judgment in question to the plaintiff on request; and that the plea affords no answer to the declaration. The plaintiff will consequently have judgment upon this demurrer.

WILLIAMS, J.—I am of the same opinion. Mr. *Wood's* argument may be most conveniently dealt with as being based upon two grounds. The first is rested upon the question whether this is a "judgment" within the meaning of the 5th section of the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97. Mr. *Wood* says it is not, because it is not a

thing held by *the creditor as a collateral security, but is a judgment recovered for the debt itself against the plaintiff and [*552 the others who were liable jointly with him. The other branch of his argument is this, that, assuming that it is a judgment within the act, this action will not lie, because the assignment of the judgment will be useless to the plaintiff when he has got it. The question for our determination is, whether either of these arguments is well founded. For the first point, Mr. *Wood* relies upon the language of the section, which entitles the surety or person jointly liable who has paid the debt to have assigned to him "every judgment, specialty, or other security which shall be held by the creditor in respect of such debt, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt." These latter words, "whether such judgment, &c., shall or shall not be deemed at law to have been satisfied by the payment of the debt," together with the general language of the act, fortify me in saying that the main object of the legislature was, to remedy the inconvenience in which the courts of equity found themselves when called upon to give effect to assignments of judgments and other securities. There is a long series of cases where that had been considered, of which Jones *v.* Davids, 4 Russ. 277, following Copis *v.* Middleton, 1 Turn. & Russ. 224, is the most explanatory. There, the plaintiff had joined as surety with the testator in a joint and several bond; and, after the death of the testator, he had paid the amount of the bond to the obligee, taking an assignment of the bond. The plaintiff then filed his bill, on behalf of himself and all other the specialty creditors of the testator, against the heir and the executors. For the defendants, it was objected that the plaintiff was not a specialty creditor, and therefore *could not sustain such a bill, relying upon Copis *v.* Mid- [*553 dleton; and it was urged that the bond was satisfied by payment, and the assignment of it to one of the co-obligors was an idle formality, for that the assignment of an instrument which had ceased to have any legal force could not confer any legal rights. And the bill was accordingly dismissed; the Master of the Rolls (Sir John Leach) saying: "After the assignment, the action on the bond must be brought in the name of the obligee; and payment by the surety would be an answer to the demand." The courts of equity, therefore, felt themselves unable to give the surety the full benefit of the assignment, because payment to the obligee would be deemed at law to be a satisfaction of the bond, and so would defeat any action thereon by the surety against the principal. It was with reference to that difficulty that the clause in question was introduced. As to the main point arising in this case, whether this judgment is a security within the statute, it certainly does seem to me to fall within it. It is a judgment held by the creditor in respect of the debt, and is therefore primâ facie within the very words of the section. The statute evidently contemplates the case where satisfaction of the judgment by the surety would be a good bar to an action at law by him against the principal. The argument here is exactly the same as it would have been, if, instead of the action being brought by a co-defendant, it had been brought by a co-surety. I see no reason to doubt that the statute meant that the person who, being surety or liable for the debt or duty of another, is called upon to pay the debt or perform the duty, should have all the benefit that can accrue to him from an

assignment of the judgment. So much as to the first point. Then, as to the second,—that the assignment would be useless, because, if the
*554] plaintiff sought to avail himself *of it, he would be met by a plea in bar that the judgment had been satisfied by payment. I agree with my Lord Chief Justice, that, according to the proper construction of the statute, the intention of the legislature was to extend the remedy, not to a surety only, but also to a person who, being liable to pay the debt or perform the duty of another, is in the nature of a surety. I think we are fully justified in construing the statute so as to extend the benefit of it to one who, like this plaintiff, was liable as a co-debtor. After saying that "every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty," goes on to provide that "such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity in order to obtain from the principal debtor or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have paid such debt or performed such duty:" and then it goes on further to say that "such payment or performance so made by such *surety* shall not be pleadable in bar of any *such action* or other proceeding." The statute supposes the action to be brought by the person who sustains either of the characters mentioned in the earlier part of the section, viz., a *surety*, or a person
*555] *liable with another* for *any debt or duty; and it evidently means, that, if in any such action, the payment by the surety be set up as a bar, it shall not be allowed. I think, therefore, we are fully justified in construing "surety" in the latter part of the section in the large sense suggested by my Lord. Besides, if we are fully satisfied that the case falls within the earlier part of the section, I am by no means prepared to say that the plaintiff is not entitled to an assignment of the judgment, because peradventure it may be of no avail to him.

BYLES, J.—I am of the same opinion. The only difficulty I have felt is, that the words "co-contractor" and "co-debtor" are not repeated in that part of the clause which provides that the payment shall not be pleadable in bar of any action or other proceeding by the party making it. But it must be remembered that one who is liable jointly with others stands in the position of surety for their proportions of the debt, and, if he pays the whole, is entitled to call upon them for contribution. In all rational systems of law, where a surety pays the debt, he is entitled to the benefit of all securities which the creditor held. Such is the law of France,(*a*) where law and equity are blended. Such also is the law of Scotland.(*b*) The preamble to the Mercantile Law Amendment Act recites the inconvenience of the law of England being in some particulars different from that of Scotland: and I apprehend that the enact-

(*a*) Code Napoleon, Book III., sect. II., art. 2029 et seq.
(*b*) See Bell's Commentaries, 6th edit. pp. 271, 272.

ment now under consideration was made with the intention of assimilating the law of this country with the Scotch law in this particular. In England, prior to the passing of this act, a surety or co-debtor who had been compelled to pay the debt for which he *was liable, could not obtain the benefit of any securities held by the creditor without having recourse to a court of equity; and not always then. The section in question, I think, meant to afford the party at least the same remedy at law as he would have had in equity. This it does in two modes,—first, by enacting that he shall be entitled to have the securities assigned to him,—secondly, by taking away the technical difficulty that before existed to his making the security available, viz., that the remedy was taken away by payment. As to the first, it is clear that the provision applies not only to persons who stand in the position of sureties, but also to joint debtors. Whether they stand in the relation of principal and surety or not, is immaterial, provided there is a joint liability. And, as to the non-insertion of the words "co-contractor" and "co-debtor," in the latter part of the clause, it seems to me that that objection has been sufficiently answered. I think a "co-debtor," who pays the entire debt, is a surety in the sense in which that word is used here. Further, I agree with my Brother Williams, that whether a co-debtor is comprehended within the latter part of the section or not, he clearly is comprehended within the former, and that that alone entitles him to the assignment here sought to be enforced. And, lastly, seeing the manifest object and intention of the statute, if there be any difficulty in its construction, it ought to be construed, like all remedial statutes, so as best to advance the remedy and to suppress the mischief. For these reasons, I am clearly of opinion that the plaintiff is entitled to our judgment. [*556

KEATING, J.—I entirely concur with my Lord and my two learned Brothers in the construction which they have put upon the statute. That which was contended for by Mr. *Wood* would so limit the operation *of this very beneficial enactment as almost entirely to defeat that which was the manifest object of the legislature. If it were confined to collateral securities, there would be but few cases for it to operate upon. Besides, I find it impossible to reconcile the latter part of the clause with the construction Mr. *Wood* wishes to put upon it. I see no difficulty in reading the word "surety" as including the case of a "co-contractor" or a "co-debtor," more especially as the earlier part of the clause expressly names them as parties to be benefited by the enactment. The plea is clearly no answer to the action. [*557

Judgment for the plaintiff.

MUNDAY v. BLUCK.
BLUCK v. MUNDAY. *Jan.* 17.

It is no ground for setting aside an award that the arbitrator (the master) declined to accede to the defendant's request that he would have a view.

THIS was an action brought by a builder to recover a balance alleged to be due to him for work done in repairing two houses for the defendant, situate in a place called Mill Yard, Goodman's Fields. This cause (and another in which the parties were reversed) was referred to one of the masters under the 17 & 18 Vict. c. 125, s. 3. Evidence was given on the part of the defendant (Bluck) that the charges made for the work and materials were in many instances excessive, and that much of the work alleged to have been done had in truth never been done at all; and it was suggested by Bluck's counsel that this would be made ap-
*558] parent by an inspection of the premises, and the master was *requested to go and view them.—This, however, he declined to do; and he ultimately made an award in favour of Munday.

Norman, on behalf of Bluck, now moved to set aside the award, on the ground that the refusal of the master to view the premises amounted to legal misconduct. He referred to Phipps v. Ingram, 3 Dowl. P. C. 669, where it was held that the refusal of an arbitrator to examine witnesses is sufficient misconduct on his part to induce the court to set aside his award, though he may think he has sufficient evidence without them: and he submitted that, as an arbitrator is bound to hear all the evidence that may be submitted to him, and inasmuch as the condition of the premises in this case might be said to be actual and real evidence in the cause, and most material for the defendant, the refusal to visit them amounted to such misconduct as to vitiate the award,—there being no difference in principle between oral and real evidence.

ERLE, C. J.—I know no law which makes it imperative on the master or any other arbitrator to go and look at the premises. It is entirely a matter for his discretion. There will consequently be no rule.

The rest of the court concurring, Rule refused.

HOLLOWAY v. FRANCIS. *Jan.* 11.

References to the master under the Common Law Procedure Act, 1854, stand upon the same footing with regard to applications to set aside or send them back for reconsideration as ordinary references.

The court, therefore, will not send an award back to the master in order that he may state a case, which at the hearing he has declined to do.

THIS cause had been referred to a master under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 3. The master was asked by the defendant to state a case for the opinion of the court pursuant to s. 5, which enacts that "it shall be lawful for the arbitrator upon any compulsory reference under this act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the superior courts of law or equity at Westminster, if

he shall think fit, and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the court, and, when an action is referred, judgment, if so ordered, may be entered according to the opinion of the court." The master, however, declined to do so, and ultimately made an award in favour of the plaintiff.

Hayes, Serjt., now moved that the award might be remitted back to the master for reconsideration, in order that a case might be stated. He referred to the 8th section, which provides, that, in any case where reference shall be made to arbitration as aforesaid, the court or a judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the reconsideration and re-determination of the said arbitrator, upon such terms as to costs and otherwise as to the said court or judge may seem proper;" and he submitted, that, although in general parties are bound by the decision of an arbitrator both as to fact and law, they having selected their own tribunal; yet, under this act, where, if any *one item of the plaintiff's claim be matter of account, the whole may be compulsorily referred, leaving the parties no election, the same reasoning does not apply. He admitted that, in Hogge *v.* Burgess, 3 Hurlst. & N. 293,† the Court of Exchequer had held that the rules of law as to setting aside awards under ordinary references apply to compulsory references under the Common Law Procedure, 1854, and that the 8th section of that act only enables the court to remit the matters referred to the arbitrator in cases where they would otherwise set aside the award: but he urged that the matter should be reconsidered. [*560

ERLE, C. J.—If the objection here were tenable in point of law, I am of opinion that there is no foundation in fact. I incline to agree with the Court of Exchequer, that all objections of law as well as of fact are exclusively for the decision of the arbitrator where the reference is made under the Common Law Procedure Act, as in all other cases.

WILLIAMS, J.—I am of the same opinion. I think we have already decided in this court that references under the compulsory clauses of the Common Law Procedure Act, 1854, stand upon precisely the same footing in this respect as any other references. The legislature having put the master in the same position as any other arbitrator, it follows that we cannot interfere to set aside his award except in cases of misconduct, or for some fatal defect appearing on the face of it.

The rest of the court concurring, Rule refused.(*a*)

(*a*) See Holland *v.* Judd, 3 C. B. N. S. 826 (E. C. L. R. vol. 91).

*561] *JOSIAH BATES v. JOSEPH BATES. *Jan.* 12.

The defendant, a British subject, was served personally in California with a writ of summons issued under the 18th section of the Common Law Procedure Act, 1852, requiring him to appear thereto within fifty days. Upon an affidavit of the debt being due, and that the defendant's property in England was being disposed of, the court made an order that the plaintiff be at liberty to proceed in eight days, without giving the defendant any notice of declaration.

The court refused to stay the proceedings, upon an appearance entered by the general attorney of the defendant after the expiration of the eight days.

THE 18th section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, enacts, that, "in case any defendant, being a British subject, is residing out of the jurisdiction of the superior courts, in any place except in Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons in the form contained in the schedule (A) to this act annexed, marked No. 2, which writ shall bear the endorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the said superior courts: and the time for appearance by the defendant to such writ shall be regulated by the distance from England of the place where the defendant is residing; and it shall be lawful for the court or judge, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction, and the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the said courts in order to defeat and delay his creditors, to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to the court or judge may seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case: Provided always that the plaintiff shall be and he is hereby required to prove the amount of the debt or damages claimed by him in
*562] such action, *either before a jury upon a writ of inquiry, or before one of the masters of the said superior courts in the manner hereinafter provided; and the making such proof shall be a condition precedent to his obtaining judgment."

A writ of summons was issued under the above section and was personally served upon the defendant in California on the 10th of October last, requiring him to appear within fifty days. The time for entering an appearance having elapsed, and none having been entered, application was made to Byles, J., at Chambers, that the plaintiff be at liberty to proceed, and the learned judge made the order subject to the plaintiff's filing a declaration and serving the defendant with notice to plead thereto in fifty days.

Garth moved, on behalf of the plaintiff, upon affidavits showing that the defendant's property in this country was being disposed of, that this order might be varied by the substitution of *eight* for *fifty* days, and by relieving the plaintiff from the necessity of serving the defendant with notice of the declaration, and substituting a notice stuck up in the Masters' office, as was done in Firmin *v.* Perry, 27 Law Times 72.

There, the defendant had been served in Australia, the writ requiring him to appear within five months, and Erle, J., made the following order:—"I do order that the plaintiff be at liberty to proceed in this action by filing a declaration against the defendant, requiring him to plead thereto in eight days, and by sticking up a notice of such declaration in the masters' office; and that, in default of the defendant pleading within the said eight days, it be referred to one of the masters to examine into and see that the plaintiff's case is proved by affidavit or otherwise as the master shall think fit; and that the plaintiff shall be at liberty to *sign final judgment for the amount found due by the master." [WILLES, J.—If the defendant gets the declaration in California, he may have a defence to the action. ERLE, C. J.—I have a recollection of having interfered in two cases where there was an agent in London who was making away with the defendant's property, and made an order to proceed in eight days; and this seems to have been the course of practice at Chambers. WILLES, J.—Such an order, at all events, should not be made without special circumstances. It appears that the Lord Chief Justice and my Brothers Williams and Keating have been in the habit of making such orders at Chambers as a matter of course; and for the future I shall feel myself bound to adopt the same practice. KEATING, J.—I have never made such an order without being satisfied that the circumstances were such as to show a necessity for prompt proceeding. But I have never known a case where the defendant was so far off.] [*563

ERLE, C. J.—Upon the whole I think Mr. *Garth* is entitled to the order he prays.

WILLES, J.—I must confess I entertain considerable doubt. Probably my opinion is somewhat warped by the difficulties which the clause in question met with at its birth. It certainly was not the intention of the framers of the act that there should be judgment without a declaration; and, if there be a declaration, I do not see the justice of not giving the defendant notice thereof and an opportunity of pleading to it. The intention undoubtedly was that such opportunity should be given. We must, however, be guided by what the legislature have said, not by what the framers of the act intended. And, as the rest of the court think that the order should go so prayed, I am content to concur; *but I am clearly of opinion that such an order as this should only be made where there are special circumstances to justify it. [*564

Rule granted.(a)

Jan. 26. An appearance having been entered, after the expiration of the eight days, by one who had acted as the general attorney of the defendant, Byles, J., at Chambers, made an order to stay the proceedings.

(a) The rule was drawn up as follows:—"Upon reading the affidavit of Josiah Bates, the plaintiff, &c., &c., it is ordered that the said plaintiff be at liberty to proceed in this action by filing a declaration against the defendant requiring him to plead thereto in eight days, and by sticking up a notice of such declaration in the office of the masters of this court; and that, in default of the said defendant's pleading thereto within the said eight days, it be referred to one of the said masters to examine into and see that the said plaintiff's case is proved by affidavit or otherwise, as such master shall think fit; and that the plaintiff shall be at liberty to sign final judgment for the amount that shall be found due by the said master."

Garth obtained a rule to rescind the last-mentioned order, on the ground that the appearance was unauthorized and too late.

H. James showed cause.—He submitted that it was but reasonable that the defendant should have an opportunity of pleading, and that his attorney should have time to consult him as to his defence to the action.

Garth was not called upon.

*565] *ERLE, C. J.—I am of opinion that the order to stay the proceedings in this case should be set aside. The intention of the court in granting the order to proceed, was, to give effect to an expensive process served at the other side of the globe. If the defendant, having been duly served, does not choose to instruct some one to appear for him according to the exigency of the writ, he must take the consequences. Here, the service of the writ is effected in California, and the time for appearing,—fifty days,—has expired. The defendant takes no notice. Then, the plaintiff obtains leave to proceed in eight days. That period also is allowed to elapse, and then the general attorney for the defendant comes and asks to have the proceedings stayed until he can communicate with the defendant. This is, in truth, tantamount to asking us to allow the writ to be served over again. I think we should be rendering this provision of the statute vain and illusory if we permitted the plaintiff to be put to such unreasonable expense and delay.

The rest of the court concurring, Rule absolute.

*566] *EARLE v. HOPWOOD. *Jan.* 18.

A contract whereby an attorney stipulates with a client to receive, in consideration of the large advances requisite to the conducting the proceedings to a successful issue, over and above his legal costs and charges, a sum which should be commensurate with his outlay and exertions, and with the benefit resulting to the client,—is void on the ground of maintenance.

THE declaration stated, that, before the making of the agreement thereinafter mentioned, one Robert Gregge Hopwood, being seised in fee and possessed of divers freehold estates and other property of great value, by his last will and testament in writing, and by certain codicils thereto, duly made and published in that behalf, gave and devised the said estates and property unto the defendant, being the eldest son and heir of the said Robert Gregge Hopwood, his heirs and assigns, for ever, subject to certain legacies and charges therein mentioned; and the said Robert Gregge Hopwood afterwards died, having by a certain other will purporting to be made shortly before his death revoked the said first-mentioned will and codicils, and by such last-mentioned will gave and devised the said estates to certain persons other than the defendant: That the defendant having reason to believe that the said last-mentioned will had been obtained and procured from the said Robert Gregge Hopwood while incapacitated from age and infirmity, and under undue and improper influence, was desirous of taking and defending all necessary proceedings at law and in equity to dispute the validity of the said last-mentioned will, and to have the same declared invalid, and to recover and obtain possession of the said estates and property; and the defendant, being unable to advance such large sums of money as would neces-

sarily be required for and be expended in and about the instituting and carrying on and defending such proceedings at law and in equity as aforesaid, applied to and requested the plaintiff to make the said advances for the purpose aforesaid, and to institute and carry on and defend the said *proceedings as the attorney and solicitor of the defendant for the purpose aforesaid, on such terms as should be agreed upon between them; which the plaintiff agreed to do upon the terms proposed and agreed to by the defendant thereinafter mentioned: That thereupon, in consideration of the premises, and that the plaintiff would advance all sums of money and incur all pecuniary liabilities which should or might be required to institute and carry on and defend to a final hearing, decree, and judgment, all necessary proceedings at law and in equity to determine the validity or invalidity of the said last-mentioned will, and would institute and carry on and defend the same as the attorney and solicitor of the defendant, and devote his utmost skill, care and labour thereto, he the defendant promised and agreed to and with the plaintiff, that, if the said proceedings should be successful, and the said last-mentioned will be declared invalid, and the defendant obtain possession of the said estates and property, he the defendant, in compensation and reward to the plaintiff for making the said large advances, incurring the said pecuniary liabilities, and devoting his utmost skill, care, and labour in instituting and carrying on and defending the said proceedings (the defendant being without adequate means of paying him in case of failure), would pay to the plaintiff, over and above all legal costs and charges incurred, a sum of money according to the interest and benefit to the defendant from possession of the said estates and property, and sufficient to compensate and reward the plaintiff for making the said advances, incurring the said pecuniary liabilities, and devoting his utmost skill, care, and labour in instituting and carrying on and defending the said proceedings, the defendant being so without adequate means of paying him in case of failure: That, upon the making of the said agreement, he the *plaintiff became and was the attorney and solicitor of the defendant, and did as such attorney and solicitor then institute, carry on, and defend certain proceedings at law and in equity for and on behalf of the defendant, and devote his utmost skill, care, and labour thereto, and did advance and expend in and about the same large sums of money, amounting, to wit, to 4500*l.*, and did also incur large pecuniary liabilities, to wit, to the further sum of 7000*l.*, the whole of which said sums, together with his legal costs and charges in respect of the work so done and agreed to be done by him as the attorney and solicitor of the defendant as aforesaid, amounting, to wit, to the sum of 5000*l.*, the plaintiff would have lost in case of failure: That afterwards, by means and in consequence of the said proceedings so instituted and carried on and defended by the plaintiff as solicitor and attorney as aforesaid, the said last-mentioned will was decreed and adjudged to be invalid, and the defendant succeeded in recovering, and did actually recover and obtain possession of, the whole of the said estates and property, which were and are of the yearly value of 8000*l.* and upwards: That the compensation and reward due and payable by the defendant to the plaintiff as provided by the said agreement, over and above all the said legal costs and charges, amounts to a large sum of money, to wit, the sum of 30,000*l.*: And that, although the plaintiff was always ready

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and willing to do, and had in fact done, all things on his part which it was necessary he should be ready and willing to do and should do, and all conditions precedent had been performed on his part, and all things and times had respectively happened and elapsed to entitle the plaintiff to have the said agreement performed by the defendant, and to be paid by the defendant the said sum of 30,000*l.*: Yet the defendant had
*569] made default in paying, and had not paid *to the plaintiff the said sum of 30,000*l.*, or any part thereof, contrary to the said agreement, &c.

To this declaration, the defendant pleaded,—fifthly, that, before suit, he paid, discharged, and satisfied the plaintiff all his legal costs and charges as such attorney and solicitor as aforesaid, of, for, in, about, touching, or in relation to the said proceedings,—sixthly, no signed bill delivered one calendar month before action brought, pursuant to the 6 & 7 Vict. c. 73.

To these two pleas the plaintiff demurred, assigning for causes,—as to the fifth plea, "that the payment of the plaintiff's legal costs and charges furnishes no answer to the claim in respect of which this action is brought,"—and, as to the sixth plea, "that the fact of no signed bill having been delivered by the plaintiff pursuant to the 6 & 7 Vict. c. 73, constitutes no answer to the claim in respect of which the present action is brought."

The defendant joined in demurrer.

Mellish (with whom was *Pinder*), in support of the demurrers.(*a*)—If the declaration be good, there will be no difficulty in showing that the pleas are bad. The question, therefore, will be whether the agreement declared on is legal and one which the court will enforce. It appears
*570] that the defendant was a devisee *under a will, which will was revoked by a subsequent testamentary paper the execution of which was suggested to have been obtained by undue and improper means. The defendant was desirous of contesting the validity of this last-mentioned document; but, being without funds to encounter the expensive course of litigation which would be necessary to effect that object, he enters into an agreement with the plaintiff to furnish him with the requisite moneys,—a thing which the plaintiff was not bound to do simply as his attorney. This contract, it is submitted, is not within any of the statutes as to champerty or maintenance, or within any of the decisions thereon. No advantage is taken of the defendant. There is no bargain for the plaintiff to have any part of the thing which is in litigation, nor for the payment of any definite sum, nor for a security from the defendant. In no case has a party been held to be guilty of champerty, unless there has been a stipulation for a share of the subject-matter in contest: 2 Inst. 563, 564; 4 Bl. Comm. 135; 1 Russell on Crimes, by Greaves, 175; Roscoe, Cr. Ev. 658. [ERLE, C. J.—Maintenance, it may be.] That depends upon the illegal fostering of a litigation. In Hawk. P. C. 454, it is said,—"Maintenance is commonly

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"That the fifth plea is bad, on the ground that the declaration does not seek to recover the plaintiff's legal costs as the defendant's attorney and solicitor; and that the payment of these costs is quite immaterial:

"And that the sixth plea is bad, because it appears by the declaration that the action is not brought to recover fees, charges, and disbursements as an attorney and solicitor for the defendant; and that therefore 'no signed bill delivered' is not a good plea."

taken in an ill sense, and, in general, seemeth to signify an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right." In 2 Inst. 563, it is said: "If a father be impleaded, he may infeoff his son for his assistance, maintenance, and comfort. So it is that the son may of his own money, and in his own name, give fees to his father's counsel or attorney, without any expectation of repayment, and so may the father to his son's counsel; for, he is prochein ami: but so cannot the serjeant nor apprentice, for that their counsel, advice, and direction in law is only *saved to them. But the attorney may in his master's name lay out his own [*571 money to his counsel, to be repaid to him by his master again." So in Russell 176, it is said: "There are many acts in the nature of maintenance which become justifiable from the circumstances under which they are done. They may be justifiable, 1. in respect of an interest in the thing in variance; 2. in respect of kindred or affinity; 3. in respect of other relations, as that of lord and tenant, master and servant; 4. in respect of charity; 5. in respect of the profession of the law." [ERLE, C. J.—Is not the limit the advance in the capacity of attorney? Beyond that, whether done by an attorney or by any one else, it may be maintenance. What a man does as attorney is not maintenance: but he must not make a speculative bargain apart from and independent of his character of attorney. The matter was a good deal discussed in the recent case of Sprye *v.* Porter, 7 Ellis & B. 58 (E. C. L. R. vol. 90).] That was not the case of an attorney: and there was a bargain for a portion of the property in dispute or some profit out of it. Lord Campbell, in delivering judgment, there says: "Here we have *maintenance* in its worst aspect. The plaintiff and Rozas, entire strangers to the property which they say the defendant has a title to, but which is in the possession of another claiming title to it, agree with him that legal proceedings shall be instituted in his name for the recovery of it, and that they will supply him, not with any specified or definite documents or information, but with evidence that should be sufficient to enable him successfully to recover the property. Each of them is to have one-fifth of the property, when so recovered; and, unless the evidence with which they supply him is sufficient for this purpose, they are to receive nothing. They are not to employ the attorney or to advance money to carry on the litigation; but they *are to [*572 supply that upon which the event of the suit must depend, *evidence:* and they are to supply it of such a nature and in such quantity as to insure success. The plaintiff purchases an interest in the property in dispute, bargains for litigation to recover it, and undertakes to maintain the defendant in the suit in a manner of all others the most likely to lead to perjury and to a perversion of justice. Upon principle, such an agreement is clearly illegal: and Stanley *v.* Jones, 7 Bingh. 369 (E. C. L. R. vol. 20), 5 M. & P. 193, is an express authority to that effect." In Stanley *v.* Jones, the plaintiff bargained for a share of the sum to be recovered in the action. "The agreement," said Tindal, C. J., in giving judgment, "is, in effect, a bargain by a man who has evidence in his own possession respecting a matter in dispute between third persons, and who at the same time professes to have means of procuring more evidence, to *purchase* from one of the contending parties at the price of the evidence which he so possesses or can procure, an eighth part or share of the sum of money which shall be recovered by means of

the production of that very evidence. And we all agree in thinking that such an agreement cannot be enforced in a court of law. The offence of champerty is defined in the old books to be, the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it. That this was considered in earlier times, and in all countries, an offence pregnant with great mischief to the public, is evident from the provisions made by our law in the statutes of Westminster first and second, and from the language of the civil law, which was afterwards received as the law over the greater part of the continent:" 2 Inst. 484. [WILLIAMS, J.—Is there any difference between an agreement for a proportion of the sum to be recovered in the *action, *573] and a stipulation to receive a sum which bears a certain proportion to the sum to be recovered?] Perhaps not.

Lush, Q. C. (with whom were *Monk*, Q. C., and *Milward*), contrà, was not called upon.(*a*)

ERLE, C. J.—I am clearly of opinion that our judgment must be for the defendant in this case. The contract would have been directly in violation of the laws against maintenance, if the stipulation had been that the plaintiff, as attorney in the suit, in consideration of his advancing the funds necessary for carrying on the litigation, should receive a portion of the proceeds or property to be recovered. Here, the stipulation is, that, in consideration that the plaintiff would advance all sums of money and incur all pecuniary liabilities which should be required to carry on the litigation, and devote his skill and labour thereto, the defendant would, if the proceedings should be *successful, in com- *574] pensation and reward for the plaintiff's advances, &c., pay him over and above his legal costs and charges a sum of money according to the interest and benefit to him the defendant from the possession of the estates and property, and sufficient to compensate and reward him for making the advances, &c. That bargain seems to me to fall precisely within the rule as to maintenance. The only difference between the two cases, is, that, in the former, the party would have the security of the property, whereas here he has only the personal security of the defendant. But, if the defendant be a solvent man, he gets a share of the property by another mode, viz. by suing him and obtaining judgment. I am clearly of opinion that the contract is void on the ground of maintenance.

WILLIAMS, J., and KEATING, J.,(*b*) concurring,

Judgment for the defendant.

(*a*) The points marked to be argued on the part of the defendant were as follows:—

"That the declaration is substantially vicious and bad in law, as disclosing only an illegal, corrupt, and void contract:

"That it is founded on maintenance or champerty, or both, and on an attempt to entitle an attorney, quâ attorney, to contract for more than allowed professional charges:

"That the fifth plea is good in law, on the ground that an attorney cannot lawfully contract for any remuneration beyond usual and recognised fees, charges, and disbursements for business done by him as an attorney, all which fees, charges, and disbursements, it stands admitted, have been paid:

"And that the sixth plea is good in law, because it is shown by the declaration that the plaintiff's claim is founded on business done by him as an attorney, wherefore a delivery of a signed bill by the plaintiff before suit was imperative upon him, by force of the statute."

(*b*) Willes, J., was engaged in the Divorce Court.

The validity of an agreement between an attorney and his client, for a remuneration contingent on his success in a particular suit, whether by way of a

direct interest in its subject-matter or otherwise, has been much discussed in the United States, and with a considerable diversity in the result. In England the Statutes of Champerty and Maintenance relieve the question of any great difficulty; but as those statutes have not been generally adopted in the states, at least in the same shape, there is considerable room for discussion. In many cases, whether as a consequence of the local legislation, as a principle of the common law independent of any statute, or on grounds of public policy, it has been held that a purchase by an attorney of the whole or part of the subject-matter of litigation, or a contract for payment out of what shall be recovered therein, is void: Key *v.* Vattier, 1 Hamm. Ohio, 132; Arden *v.* Patterson, 5 Johns. Ch. 44; Merritt *v.* Lambert, 10 Paige 358; Walter *v.* Loubert, 2 Denio 607; Matter of Bleakly, 5 Paige 311; Satterlee *v.* Frazer, 2 Sandf. S. C. 141; Thurston *v.* Percival, 1 Pick. 415; Lathrop *v.* Amherst Bank, 9 Metc. 491; Low *v.* Hutchinson, 37 Maine 196; Rust *v.* Larue, 4 Litt. 413; Davis *v.* Sharron, 15 B. Monr. 64; Halloway *v.* Lowe, 7 Port. (Alab.) 488; Elliott *v.* M'Clelland, 17 Alab. 206; Weeden *v.* Wallace, Meigs (Tenn.) 286.

On the other hand, it has been decided in Illinois and Delaware, and such also has been said to be the rule in Arkansas, that such contracts are valid and will be enforced, unless perhaps where they are harsh and unreasonable: Newkirk *v.* Cone, 18 Illinois 449; Bayard *v.* M'Lane, 3 Harr. 216; Lytle *v.* State, 17 Ark. 663. In New York by the Code of Procedure, costs as such are now abolished, and counsel and client are expressly allowed to make such agreements as they may think proper for the amount of remuneration: Code, 4th ed., p. 465, § 303. This has been considered to abolish the old rule, and to allow a contract for an interest in the subject-matter of the suit: Satterlee *v.* Frazer, 2 Sandf. S. C. 141; Benedict *v.* Stuart, 23 Barb. 420; though see Carpenter *v.* Sixth Avenue Railroad Co., 1 Am. Law Reg. N. S. 417. In Re Plitt, 2 Wall., Jr., 453, while the taking of contingent fees was strongly reprobated, the validity of a contract to pay them was sustained under peculiar circumstances. In Virginia the Court of Appeals was equally divided on the question in that state: Major's Executors *v.* Gibson, 1 Patt. & H. 48. It was left open in Potts *v.* Francis, 8 Ired. Eq. 302, and seems not to have been raised in Wylie *v.* Coxe, 15 How. U. S. 416, where a contingent compensation for the prosecution of a claim against a foreign government, to be paid out of the amount to be recovered, was allowed.

A somewhat singular distinction is made in Kentucky between a contract for a direct interest in the subject-matter of a suit, and one for a sum which shall be a certain proportion of the *value* of the thing recovered, which last is held to be allowable: Wilhite *v.* Roberts, 4 Dana 173; Evans *v.* Bell, 6 Dana 479; Ramsey *v.* Treat, 10 B. Monr. 341. The difference, as a matter of public policy, is not clear. That *after* a verdict obtained, or decree rendered, an agreement may be lawfully made for compensation out of the fund or land recovered, for the *past* services, seems generally admitted: Floyd *v.* Goodwin, 8 Yerg. 494; Walker *v.* Cuthbert, 10 Alab. 219: but it would probably be subject to the supervision of a court of equity, as all bargains between persons standing in confidential relations must be.

That an attorney who has made a bargain with his client, void on the ground of maintenance or champerty, may nevertheless recover a reasonable compensation for his services on a *quantum meruit*, was decided in Rust *v.* Larue, 4 Litt. 417; Thurston *v.* Percival, 1 Pick. 415; Caldwell *v.* Sheppard, 6 Monr. 380: but left doubtful in Low *v.* Hutchinson, 37 Maine 196; Halloway *v.* Lowe, 7 Porter (Alab.) 488.

*575] *The Company of Proprietors of the Navigation of the RIVER MEDWAY *v.* The Right Hon. CHARLES EARL OF ROMNEY and Others.

By a public act of parliament (13 G. 2, c. 26), certain persons were incorporated, with the usual powers, for the purpose of making the river Medway and streams thereinto flowing navigable, and it was amongst other things enacted that "the said river or streams so to be made navigable, and all lands, tenements, and hereditaments to be by them (the company) made use of for the benefit of the said navigation by virtue of a former act and that act, should be and were thereby vested in the said company, their successors, heirs, and assigns for ever."

The defendants erected works on the banks of the river for the purpose of raising, and thereby raised, water from the river, for the supply of the county lunatic asylum and county gaol:—

Held, that the statute created in the company a property and interest in the water of the river which was interfered with by the abstraction of it for the purposes to which it was applied by the defendants,—purposes more extensive than those for which a riparian proprietor, as such, could insist upon appropriating the stream as it passed by his land; and that it was not necessary to the maintenance of the action that there should be actual damage to the navigation, inasmuch as the legislature intended to give the company such an interest in all the water of the river for the purposes of the navigation as was interfered with by the abstraction of any part thereof.

Whether or not the riparian proprietors could exercise for the benefit of the land adjoining the river the rights which ordinarily belong to such proprietors,—*quære?*

THIS action was brought by the plaintiffs against the defendants for an alleged trespass committed on land claimed by the plaintiffs, described as land covered with water, called the River Medway, by entering thereon and placing a pipe therein for conveying water from the said river, and also for continuing the pipe in the said land after notice to remove or stop up the same; and also for an alleged wrongful diversion and abstraction of water from the said river, whereby the depth of the water was alleged to have been diminished and the river rendered less navigable,—the plaintiffs claiming, under the acts of parliament hereinafter mentioned, to be the owners and proprietors of the river and in possession thereof and of the water flowing along the same, and by reason thereof entitled to the full use and enjoyment of such water without interruption by the defendants.

The defendants by their pleas denied the alleged trespass and wrongful acts and the alleged rights claimed by the plaintiffs. And the defendants further alleged that the river was a common public and navi-
*576] gable river, subject to the tolls mentioned in the said *acts of parliament, and that only under the said acts of parliament was the said land the plaintiffs' for the purposes only in those acts mentioned; and that the defendants, as justices of the peace for the county, and members of the committee of visitors for the county lunatic asylum and of the county gaol, claimed a right to convey water from the river to the county lunatic asylum and to the county gaol, and to divert and abstract water from the said river for the necessary drink and domestic use of the inhabitants of the said gaol and asylum, and to lay and continue the pipe in the river Medway for those purposes; and alleged that they did not sensibly or in any material degree diminish the depth of the water in the said river, nor were the waters thereof rendered less navigable or the navigation impeded or interfered with.

The plaintiffs demurred to the two last pleas and joined issue on all the pleas; and the case came on for trial at the Kent Summer Assizes,

1859, before Crowder, J., and a special jury, when, by consent of the parties, and, by order of nisi prius, a verdict was taken for the plaintiffs, subject to the opinion of the court upon the following case:—

The parties are a body corporate acting under the provisions of an act of parliament made and passed in the 17th year of the reign of King Charles the Second (c. 11), intituled "An Act for making the river of Medway navigable, in the counties of Kent and Sussex," and of another act of parliament made and passed in the 13th year of the reign of King George the Second (c. 26), intituled "An Act to revive, explain, and amend an act made in the 16th and 17th years of the reign of his late Majesty King Charles the Second, intituled "An Act for making the river of Medway navigable, in the counties of Kent and Sussex."

Copies of these acts of parliament accompanied and were to be deemed to form part of the case.

*Since the passing of the said acts of parliament, the plaintiffs, within the limits mentioned in such acts, and for the purposes of those acts, have made and kept the river Medway navigable, and from time to time cleansed, widened, and deepened the same, and removed impediments to the navigation, and constructed between Forest Row and Maidstone fourteen locks and weirs, tumbling-bays, and other works for the improvement of the navigation, and, amongst others, they have constructed a lock on the river at East Farleigh, in the county of Kent, distant about two miles from Maidstone, higher up the river, and between Maidstone and Forest Row. [*577

The plaintiffs have also from time to time since the passing of the said acts been in the habit of selling sand and gravel which has been dug out of the bed of the river in the necessary process of deepening the same, and have also during the same period been accustomed to dig out and sell to parties applying for the same, as well as to grant to the adjoining landowners upon their application permission to dig out of the bed of the river and remove for their own use, sand and gravel which presented no obstruction to the navigation: but no sand or gravel, so far as appears, has ever since the passing of the said acts been removed from the bed of the river without the permission of the plaintiffs.

Since the passing of the said acts persons desirous of erecting mills along that part of the Medway to which these acts relate, have always previously applied to the plaintiffs for permission to use the water of the river for the purposes of their mills. Such permission has sometimes been granted and sometimes refused by the plaintiffs: but it does not appear that the water has ever been used without the permission of the plaintiffs for any mill erected since the passing of the said acts.

*Prior to and since the year 1769, one of the landowners having meadow lands adjoining that part of the Medway to which the said acts of parliament relate, has claimed and exercised without interruption the right of diverting the water from the river at certain seasons, for the period of forty hours at a time, for the purpose of flooding his said lands, the surplus water not absorbed being returned by him into the water at a lower point: but there is no direct evidence to show how such right arose, or at what period it was first claimed or exercised. [*578

The plaintiffs have at different periods since the passing of the said acts of parliament purchased and taken conveyances of portions of the banks of the said river, and have used part of the land so purchased

for the purpose of towing-paths, and other part thereof for the purpose of widening the river: but there is no evidence that the plaintiffs have ever purchased or taken a conveyance of any part of the original bed of the said river as it existed at the time of the passing of the said acts.

The defendants are justices of the peace for the county of Kent, and members of the committee of visitors for the Kent County Lunatic Asylum and for the Kent County Gaol.

The Kent county lunatic asylum is situate at Barming Heath, and distant about one mile from the East Farleigh Lock, and at an elevation of about 250 feet from that lock; and between it and the river Medway lie the turnpike road, the South Eastern Railway, and various enclosures the property of third parties: and the county gaol is situate at the further end of the town of Maidstone, and distant about three miles from the East Farleigh Lock, and is separated from the river Medway by a great part of the town of Maidstone, and by the lands of third parties.

*579] *In the year 1856, the committee of visitors for the asylum, being desirous of obtaining a supply of water from the river Medway for the use of the asylum, applied to the plaintiffs and obtained their permission to take from the river Medway above Farleigh Lock a sufficient supply of water for the use of the asylum only, on payment of 5*l.* a year by the defendants to the plaintiffs.

In order to effect this object, the visitors of the asylum obtained possession from the South Eastern Railway Company of a piece of ground near the lock, part of certain ground belonging to that company which adjoins the river on the eastern side of Farleigh Bridge, with the liberty and license of laying down a pipe through such adjoining land into the river, and erected on the land possession of which was obtained as aforesaid a water-wheel and pumps and machinery necessary to raise the water to the asylum, and laid down a pipe through the bank of the aforesaid adjoining land into the river Medway, and at the distance of a few feet above the aforesaid lock at East Farleigh. Through this pipe the water flowed from the Medway into a cistern from which a sufficient portion for the purposes aforesaid was pumped up by means of the water-wheel and machinery (such water-wheel and machinery being worked by part of the water taken from the Medway), and thence conveyed by another pipe to the asylum,—the surplus water required for turning the wheel and working the pumps being returned into the river below the lock, by another pipe laid down for that purpose.

These works were constructed with the knowledge of the general managers employed by the plaintiffs; and no objection was ever made by the plaintiffs to the means of taking the water employed by the visitors, before the permission to take it was revoked as hereinafter mentioned.

*580] *Subsequently to the erection of the said water-wheel and machinery, that is to say, in the year 1858, the supply of water for the use of the county gaol was found very insufficient; and the county surveyor having suggested the idea of supplying the gaol from the river Medway by means of the above-mentioned water-works, and inquired of the plaintiffs whether they would consent to allow the further supply of water to be taken from the river by means of the same ma-

chinery through the reservoir at the lunatic asylum, the plaintiffs were willing to give their consent on being paid by the county the further sum of 15*l.* a year as rent.

On the subject, however, being reported to the court of general sessions, the defendants denied that the plaintiffs had the right to make any charge for the use of the surplus water not required for the purpose of navigation; and the defendants, without the permission of the plaintiffs, laid down pipes from the asylum to the gaol, and by the same machinery erected for pumping up the water for the purpose of supplying the asylum, obtained a supply of water taken from the river, not only for the asylum, but for the county gaol, and the defendants declined paying any rent or compensation to the plaintiffs for so doing.

The circumstance of the gaol being so supplied having come to the knowledge of the plaintiffs, certain correspondence took place between the parties; and, under a threat by the plaintiffs of cutting off the supply unless the matter were arranged, the defendants, on the 16th of March, 1859, discontinued the supply of water from the reservoir at the asylum to the gaol; but on the 18th of April, 1859, the defendants again turned on the water from the asylum for the use of the gaol.

Further correspondence then took place between the parties, which resulted in the plaintiffs, on the 19th of *May, 1859, revoking the permission given by them to take water from the river Medway. [*581

Notwithstanding, however, this revocation, the defendants have ever since continued to use the pipe and machinery and to take water from the river for the purpose of turning the said water-wheel and working the pump, and supplying both the asylum and the gaol with water; and the asylum and gaol continue to be and still are supplied with water so taken.

The court was to be at liberty to draw any inference of fact from the facts herein stated which a jury might draw.

By the order of nisi prius, it was stipulated that this case should be settled by Mr. Archibald, if the parties should differ (which event of course happened); and it was also stipulated and agreed thereby, that, if the court should think the question of injury to the navigation material to the decision of the court, then this case should be referred back to the said Mr. Archibald, to ascertain and state therein whether the diversion of the water was injurious to the navigation of the river.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover upon both or either of the counts in the declaration.

If the court should be of opinion in the affirmative, then judgment was to be entered for the plaintiffs accordingly, for the sum of 20*l.* and costs: but, if the court should be of opinion in the negative, then judgment of nolle prosequi was to be entered for the defendants, with costs.

Lush, Q. C. (with whom was *Honyman*), for the plaintiffs.(*a*)—Under

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That, upon the true construction of the company's acts of parliament, the bed and water of the Medway are vested in the plaintiffs.

"2. That this construction of the company's acts is corroborated by the various acts of ownership and other evidence set forth in the case:

"3. That the defendants show no right to take away any of the water of the Medway:

"4. That, assuming that the riparian proprietors would be justified in taking the water for

*582] the acts of parliament referred to *in the case, the river Medway and the bed and soil thereof and the waters therein are vested in the plaintiffs, and no person can have any right without their permission to abstract any of the water within the limits over which their rights and jurisdiction extend. The acts of parliament referred to in the case, are, the 16 & 17 Car. 2, c. 11, and the 13 G. 2, c. 26. By the former, after reciting "that making the river Medway and all other rivers, streams, and watercourses falling thereinto, in the counties of Kent and Sussex, navigable, had been upon view found to be feasible, and would be of great use for the better and more easy and speedy portage of iron, ordnance, balls, timber, and other materials in places adjacent made, forged, and provided for his Majesty's service, at all times, and more especially at such times and seasons in the year as the same could not otherwise be brought out of those parts, and would be advantageous to the inhabitants and all others concerned, as well for carriage of the commodities aforesaid as of wood, corn, and grain, hay, hops, wool, leather, and all other provisions growing and accruing from thence, *583] as also of coals, lime, stone wares, and all other necessaries and *commodities to be carried thither, whereby commerce and trade would be much increased, and the public weal advanced,"—it was enacted "that it should and might be lawful for certain persons therein named to make the said river and the streams running thereinto navigable," in such manner as by the said act is limited and directed; and commissioners were also therein appointed, with power to adjudge and determine proper satisfaction to all person and persons, bodies politic and corporate, for any loss or damage to be by them sustained, by cutting, digging, or otherwise damnifying their lands and tenements in making the said river and streams navigable, with a power to appoint new commissioners in the stead of those dying or refusing to act. By the 13 G. 2, c. 26,—after reciting that the powers by the former act created were never carried into execution, and that the several persons authorized thereby to make the said river and streams navigable, and the several commissioners therein named and appointed were all since dead, without any proper successors appointed in their stead in manner as by that act was directed; and that the making of the said river and streams navigable at this time was likely to be of great utility to the public, by reason that great quantities of timber growing on the woods of Kent and Sussex, through which the said river and streams ran, and which was allowed to be the best in this kingdom for the use of his Majesty's navy, could not be conveyed to any market but at a very large expense by reason of the badness of the roads in those parts; and that divers persons thereinafter named, and many others, were desirous to become undertakers for making the said river Medway and streams navigable, and had agreed to raise amongst themselves a sum of money sufficient for that purpose,—incorporated the undertakers by *584] the name of "The *Company of Proprietors of the Navigation of the River Medway," who by s. 2 were empowered to cleanse, scour, dig, widen, and deepen the river and streams, &c., to make new

purposes such as those mentioned in the defendants' pleas, the defendants, not being riparian proprietors, had no right so to do:

"5. That the mere abstraction of the water is in itself a violation of the plaintiffs' rights, and that the question of actual injury to the navigation is wholly immaterial."

channels, &c., to remove all impediments, to erect locks, &c., and by those and other means to make the same navigable, and to make wharves and other necessary erections both on the said river and streams and lands adjoining, in such manner as the proprietors in and by the said former act were empowered to do: and the section then proceeded to enact that "*the said river or streams so to be made navigable, and all lands, tenements, and hereditaments to be by them* (the company) *made use of for the benefit of the said navigation by virtue of the former and this present act, shall be and are hereby vested in the said company, their successors, heirs, and assigns for ever.*" And by s. 4, upon payment of compensation, the company were empowered to use lands, and thereupon erect works, and do anything for carrying on and maintaining the said navigation and works, and to have, use, and enjoy the same for their own use and benefit. Whether or not the soil passes to the company by these words, it is clear that the river does. [WILLES, J.—Is that so clear? I remember the question arising upon the River Lea acts; and it was treated as a very grave one.] The case of the Rochdale Canal Company *v.* King, 14 Q. B. 122 (E. C. L. R. vol. 68), goes even further than is necessary for the decision of this case. There, the statute 34 G. 3, c. 78, empowered a company to purchase lands for making and maintaining a navigable canal, and contained provisions with respect to the conveyance of the land and its vesting in the company on payment of the price assessed by compensation juries. It was also provided by the same act (explained by the 46 G. 3, c. xx., s. 23), that manufacturers within a certain distance of the canal might, after notice to the proprietors of the canal, lay down pipes to supply their *steam-engines with water for the sole purpose of condensing the steam used for working such engines. A declaration in case by [*585 the company stated that the canal had been made and maintained by them in pursuance of the act; that the defendants, having steam-engines within the prescribed distance of the canal, had, after notice to the company, laid down pipes communicating with the canal; and that they had used the water drawn off by such pipes for other purposes than condensing the steam of their engines. It was objected in arrest of judgment, and afterwards on writ of error, that the declaration did not show any conveyance or ownership of the canal or water, nor any invasion of a private right, or damage to such a right, inasmuch as the act complained of, if wrongful, was clearly prohibited by statute, so that a repetition of the act could never be used as evidence that it was rightful: and it was held by the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the declaration was good,—that it must be taken that the company was in possession of the canal; and that, without an averment of special damage, the wrongful act appeared to be a damage to the company's right. [WILLES, J.—There was a subsequent case of the Rochdale Canal Company *v.* Radcliffe, 18 Q. B. 287 (E. C. L. R. vol. 83).] Lord Denman in the former case says: "The company is invested by the legislature with certain rights, and may maintain an action for an invasion of them. The use of the canal water by the millowner for any other purpose than the condensation of the steam in his steam-engine, is distinctly treated as an abuse by stat. 46 G. 3, c. xx., s. 23, and is consequently an invasion of the company's rights." The Crown was the riparian proprietor of part of the lands

adjoining the river. The compensation for those lands would include
*586] compensation for the soil of the bed of the river. It is no *forced construction of the words of the statute, therefore, to hold that they carry the soil. Assuming, however, that the words are not sufficient to carry the soil of the river, they at all events convey to the company an interest in the water such as will enable them to maintain an action against any person interfering with their rights. [ERLE, C. J. —All that a riparian proprietor is entitled to, is flumen aquæ; but no atom of the water belongs exclusively to him.] The company here, for a purpose beneficial to the public, possess rights far beyond those which the common law gives to every riparian proprietor. It may be that they have only a qualified property; but it is at the least sufficient to enable them to protect it against the invasion of wrongdoers. [ERLE, C. J.— There is a manifest difference between water in a canal and the waters of a navigable river. In the Rochdale Canal Company *v.* Radcliffe, all the water was appropriated by the act of parliament.] If any one riparian proprietor might take water from the Medway in the manner and for the purposes that these defendants have done so, a number of persons might take it, and to an extent which might seriously affect the navigation. The court will put such a construction upon these acts of parliament as will prevent the important public objects with which they were passed being frustrated.

Bovill, Q. C. (with whom was *Deedes*), for the defendants.(*a*)—The
*587] defendants assert their right to take *this water from a public river for public purposes, doing no injury to the navigation. If *all* the water which flows in the Medway were necessary to render it navigable, the plaintiffs had no right to sell any portion of it, as they have been doing for several years. It hardly lies in their mouths, therefore, to say, that the navigation is affected by what the defendants have done. At common law, no person could have a property in running water, but only a qualified right to the use of it as it flowed past his land. In Callis on Sewers,—which has always been held to be a high authority upon these matters,—p. 78 (orig. edit.), the learned author says: "It may here, as I take it, be moved for an apt question, in whom the property of running waters was; for, in Natura Brevium, fol. 128, there is a quod permittat habere liberam piscariam in aqua ipsius L., whereby it appears that the plaintiff had property in those waters; and in Pl. Com. 154, one granted aquam suam in L., and the piscary passeth thereby, and so did the soil also, in my opinion; for, in 12 H. 7, fo. 4, a præcipe quod reddat is brought de una acra terræ cu' aqua cooperta. In my conceit, the civil law makes prettier and neater distinctions of

(*a*) The points marked for argument on the part of the defendants were as follows:—

"1. That, upon the true construction of the company's acts of parliament, the bed and water of the Medway are not vested in the plaintiffs:—

"2. That if upon such construction of the said acts of parliament, the water of the Medway is vested in the plaintiffs, it is vested in them for the purposes of navigation only:

"3. That the facts and statements in the case show no acts of ownership on the part of the plaintiffs, but only acts done by them for the purposes of navigation:

"4. That the defendants, although not riparian proprietors, have the right as members of the public to take water from the river for the purposes stated in the case, provided the navigation is not interfered with, of which there is no evidence:

"5. That the mere abstraction of the water from the river is not in itself a violation of any right in the plaintiffs, unless it appears that the navigation is interfered with, and actual damage sustained by the plaintiffs, of which there is no evidence."

these than our common law doth: for, there it is *said that naturali ratione quædam sunt communia, ut aer, aqua profluens, [*588 mare, et littora maris. I concur in opinion with them, that the air is common to all; and I hold my former definitions touching the properties of the sea and the sea-shores. But that there should be a property fixed in running waters, I cannot be drawn to that opinion; for, the civil law saith farther, quod aqua profluens non manet in certo loco, sed procul fuit extra ditionem ejus quod flumen est ut ad mare tandem perveniat; for, in my opinion, it should be strange the law of property should be fixed upon such uncertainties as to be altered into meum, tuum, suum, before these words can be spoken, and to be changed in every twinkling of an eye, and to be more uncertain in the proprietor than a cameleon of his colours." In Liggins *v.* Inge, 7 Bingh. 682, 692 (E. C. L. R. vol. 20), 5 M. & P. 712, 728, Tindal, C. J., says: "Water flowing in a stream, it is well settled, by the law of England, is publici juris. By the Roman law, running water, light, and air were considered as some of those things which had the name of res communes, and which were defined 'things the property of which belongs to no person, but the use to all.' And, by the law of England, the person who first appropriates any part of the water flowing through his land to his own use, has the right to the use of so much as he thus appropriates, against any other: Bealey *v.* Shaw, 6 East 208. And it seems consistent with the same principle, that the water, after it has been so made subservient to private uses by appropriation, should again become publici juris by the mere act of relinquishment. There is nothing unreasonable in holding that the right which is gained by occupancy should be lost by abandonment." The Rochdale Canal *v.* King, 14 Q. B. 122 (E. C. L. R. vol. 68), is a totally different case from the present. There, the whole of the water of the *canal was necessarily vested in the proprietors. Parliament, however, never could have intended to give these plaintiffs [*589 a property in a thing so changeable as the waters of a natural stream: and, if they had intended to vest in them the soil of the river, it would have been easy to say so. It is not usual to convey the right to the soil unless the actual ownership of it is necessary to the carrying out the purposes of the undertaking. In The King *v.* The Aire and Calder Navigation, 9 B. & C. 820 (E. C. L. R. vol. 17), 4 M. & R. 728, an act of parliament of the 9 & 10 W. 3 gave to certain undertakers authority to make navigable the river Aire, and for that purpose to cleanse and scour the same, and dig and cut the banks. By a subsequent act, reciting that the legal estate and interest in the navigation of the said river, and divers messuages, mills, warehouses, buildings, lands, tenements, and hereditaments were vested in trustees, they were authorized by deed to sell and convey in fee such messuages, mills, lands, or tenements belonging to the undertakers, or to convey in fee, by way of mortgage, as well *the said navigation* as also all or any messuages, mills, lands, tenements, and hereditaments, being the property of the undertakers: and it was held that the word "navigation" in that act imported an incorporeal hereditament, and that it authorized the trustees to mortgage in fee that incorporeal hereditament; and, the first act having given the undertakers an incorporeal hereditament only in the bed of the river, they were not rateable to the poor as occupiers or owners of the river Aire. [WILLES, J., referred to Badger *v.* The South Yorkshire Rail-

way and River Dun Navigation Company, 5 Jurist, N. S. 459.] The rights of riparian proprietors are well defined in Embrey *v.* Owen, 6 Exch. 353,† where it was held that flowing water is publici juris in this sense only, that *all may reasonably use it who have a right of access to it, and that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. The words used here are so untechnical that the court must put upon them such a construction as will best consist with the ordinary course of decision, that is, that they give the proprietors such an interest in the subject-matter of legislation as is necessary to enable them to carry out the purposes of their incorporation, and nothing more,—like the case of trustees of turnpike-roads, in whom the soil is not vested, but who merely have the control of the highway: Davison *v.* Gill, 1 East 64, 69, per Lord Kenyon; Stracey *v.* Nelson, 12 M. & W. 535.† In Hollis *v.* Goldfinch, 1 B. & C. 205 (E. C. L. R. vol. 8), 2 D. & R. 316 (E. C. L. R. vol. 16), the commissioners for making navigable the river Itchin under the 16 & 17 Car. 2 (which passed in the same year as the first of the acts now in question) were held not to acquire such an interest in the soil in a bank adjoining to and formed out of the earth excavated from the new channel made for the first time under the act, as would enable them to maintain trespass. So, here, there are no words large enough to convey to these plaintiffs any interest in the soil of the river; and the only interest they take in the water is one which is co-extensive with their powers and duties, viz., to make the river Medway navigable. If the defendants have done anything to obstruct or impede the navigation, they may be made responsible by indictment, but not in a civil action. The following cases were also cited:—Bruce *v.* Willis, 11 Ad. & E. 463 (E. C. L. R. vol. 39), 3 P. & D. 220, The King *v.* The Mersey and Irwell Navigation, 9 B. & C. 95 (E. C. L. R. vol. 17), 4 M. & R. 84, Doe d. Queen *v.* The Archbishop of York, 14 Q. B. 81 (E. C. L. R. vol. 68), The Queen *v.* Betts, 16 Q. B. 1022 (E. C. L. R. vol. 71), and Bostock *v.* The *North Staffordshire Railway Company, 4 Ellis & B. 798 (E. C. L. R. vol. 82).

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Lush, in reply.—Riparian rights have nothing whatever to do with the present question.—The court is here called upon to construe the words of the acts of parliament. It must be borne in mind that the Medway was not navigable at the time at this part of it, and that the object of the acts was to make it so,—a duty which the plaintiffs could not efficiently perform without having the soil of the river vested in them. He referred to Hale de Jure Maris, edit. 1787, Part 1, c. 3, p. 9. *Cur. adv. vult.*

WILLES, J., now delivered the judgment of the court:—

It appears to us that the plaintiffs are entitled to recover upon the second count of the declaration, alleging an injury to their right in the river Medway.

Looking to the objects which were contemplated by the acts of parliament to which our attention has been directed, we cannot construe the statute 13 G. 2, c. 26, s. 2, as giving the plaintiffs only such a limited right in the river as a private grant of the "said river and stream" might have conveyed, but as creating a new species of statutory property and interest in the water, which in our opinion was interfered

with by the abstraction of it for the purposes to which it was applied by the defendants; which purposes were more extensive than those for which a riparian proprietor, as such, could insist upon appropriating the stream as it passed by his land.

In our view of the true construction of the acts of parliament, it is not necessary that there should be an actual damage to the navigation, because we think *that the legislature intended to give the company such an interest in all the water of the river for the purposes of the navigation as is interfered with by the abstraction of any part thereof. [*592

Whether or not the riparian proprietors can exercise for the benefit of their land adjoining the river the rights which ordinarily belong to such proprietors, it is unnecessary to express an opinion.

Judgment for the plaintiffs.

BRADY *v.* TODD. *Jan.* 29.

The servant of a *private owner* intrusted to sell and deliver a horse on one particular occasion, is not *by law* authorised to bind his master by a warranty: the buyer therefore, taking such a warranty, takes it at the risk of being able to prove that the servant had *in fact* his master's authority for giving it.

THIS was an action for the breach of a warranty on the sale of a horse, that it was quiet in harness. The defendant by his pleas traversed the alleged warranty, and averred that the horse at the time of the sale was quiet in harness.

The cause was tried before Cockburn, C. J., at the last Summer Assizes at Maidstone, when the following facts appeared in evidence:—The defendant, who was a potato salesman in London, and who had a farm in Essex which was under the care of a farm bailiff named Greig, had in the month of February, 1860, purchased a horse which he sent to the farm for the bailiff's use. The defendant, an attorney, being desirous of purchasing a horse, had employed one Hart, a veterinary surgeon, to look out for one for him. Hart inquired of Greig whether the defendant would sell his horse; and (according to the plaintiff's evidence), after some correspondence, the plaintiff went to the farm to see the horse, and in the course of a *conversation with Greig on the subject, the latter, in reply to the plaintiff's inquiry whether the horse was quiet to drive, said,—"He is perfectly quiet both in saddle and harness. He is an honest horse. I assure you he is as quiet as a horse can be." Upon this representation, after having had two trials, the plaintiff bought the horse for 30 guineas. The horse turned out to be not quiet in harness, but, on the contrary, extremely vicious; whereupon the present action was brought. [*593

The defendant swore that he had not authorized his bailiff to warrant the horse: and Greig also swore that he was not authorized to give any warranty, and that he did not in fact give any.

It appeared that Greig had on two or three occasions sold horses for the plaintiff, but whether with or without warranty did not appear.

On the part of the defendant, it was objected that the authority of Greig to warrant being negatived, the plaintiff was not entitled to

recover; for that there could be no *implied* authority to warrant unless perhaps in the case of a servant of a *horse-dealer*.

For the plaintiff it was insisted that an authority to an agent to sell and deliver a horse or any other chattel imports an authority in him to warrant; and that the representations of Greig in law amounted to a warranty.

His Lordship left it to the jury to say whether there was any warranty, telling them that it was not necessary that the word "warrant" should be used, and whether Greig had authority in point of fact to warrant,—reserving the question of implied authority for the court.

The jury having returned a verdict for the plaintiff,

*594] *Montagu Chambers*, Q. C., in Michaelmas Term last, *obtained a rule nisi to enter a verdict for the defendant, or a nonsuit, pursuant to leave reserved, "on the ground that there was no evidence of authority in Greig to warrant, and that without express authority he had none, and that there was evidence to prove that Greig had no such authority;" or for a new trial "on the ground that the verdict was against the evidence on the question of unquietness and on the question of warranty." He referred to Fenn *v.* Harrison, 3 T. R. 757, The Bank of Scotland *v.* Watson, 1 Dow P. C. 40, 45, and Woodin *v.* Burford, 2 C. & M. 391:† and he observed upon the case of Helyear *v.* Hawke, 5 Esp. N. P. C. 72.

Hawkins and *Barnard* showed cause.—An authority to a servant or agent to sell is by implication an authority to do all that is usually incident to the sale of the particular thing which he is about to sell. Thus, if a horse is intrusted to a servant to sell, and the servant warrants the animal, the master is bound by his act, even though it be proved that he expressly forbade him to warrant, provided the purchaser has bought the horse upon the faith of the representations made at the time by the servant: per Lord Ellenborough in Helyear *v.* Hawke, 5 Esp. N. P. C. 72. In Story on Agency, §§ 58, 59, it is said that the authority of an agent, however conferred, "is, unless the contrary manifestly appears to be the intent of the party, always construed to include all the necessary and usual means of executing it with effect." "So, a servant intrusted to sell a horse, is clothed by implication (unless expressly forbidden) with authority to make a warranty on the sale,"—citing Fenn *v.* Harrison, 3 T. R. 757, Helyear *v.* Hawke, 5 Esp. N. P. C. 72, and Alexander *v.* Gibson, 2 Campb. 555. "So, it has been said (§ 132), that, if a person keeping a livery stable, and having a horse to sell, intrusts a servant with power

*595] to sell the horse, *and directs him not to warrant the horse, and the servant, nevertheless, upon the sale should warrant him, the master would be bound by the warranty; because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognisant of any private conversation between the master and the servant. But, if the owner of a horse should send the horse to a fair by a stranger, with express directions not to warrant him, and the latter should on the sale, contrary to his orders, warrant him, the owner would not be bound by the warranty." In the note it is said: "Mr. Justice Bayley, in Pickering *v.* Rusk, 15 East 45, has put the case in its true light, as being that of a *horse-dealer*. 'If,' said he, 'the servant of a horse-dealer, with express directions not to warrant, do warrant, the master is bound; because the servant, having a general authority

to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed.' " In Langhorn *v.* Allnutt, 4 Taunt. 511, 519, Gibbs, J., says: "When it is proved that A. is agent of B., whatever A. does or says or writes in the making of a contract as agent of B., is admissible in evidence, because it is part of the contract which he makes for B., and therefore binds B." So, the master of a ship has, in the absence of the owner or means of communicating with him, authority to pledge his credit for all things necessary for the purpose of conducting the navigation to a favourable termination; and for that purpose he may borrow money for services which require prompt payment: Beldon *v.* Campbell, 6 Exch. 886.† "The master," says Parke, B., in delivering the judgment of the court, "is appointed for the purpose of conducting the navigation of the ship to a favourable termination, and he has, as incident to that employment, a right to bind his owner *for all that is necessary, that is, upon the legal maxim 'Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.' Consequently, the master has perfect authority to bind his principal, the owner, as to all repairs necessary for the purpose of bringing the ship to its port of destination; and he has also power, as incidental to his appointment, to borrow money, but only in cases where ready money is necessary, that is to say, where certain payments must be made in the course of the voyage, and for which ready money is required. An instance of this is the payment of port-dues, which are required to be paid in cash, or lights, or any dues which require immediate cash payments." In Murray *v.* Mann, 2 Exch. 538,† the same learned judge says: "The rule of law is, that, if an agent is guilty of fraud in transacting his principal's business, the principal is responsible,"—citing Cornfoot *v.* Fowke, 6 M. & W. 358.† [WILLIAMS, J.—He is there speaking of the general authority of an agent to conduct a business.] Fuller *v.* Wilson, 3 Q. B. 58 (E. C. L. R. vol. 43), 2 Gale & D. 460, enunciates the same principle.(*a*) Suppose a servant intrusted by his master to sell a horse for cash, without any authority sells it upon credit,—would not the servant's contract bind the master? By reason of the warranty given by the servant here, the horse fetches a much higher price than it would have done without a warranty,—does it lie in the master's mouth to deny the servant's authority to warrant, and yet retain the ill-gotten gain?(*b*) *In Helyear *v.* Hawke, 5 Esp. N. P. C. 72, Lord Ellenborough says: "If the servant is sent with the horse by his master, and which horse is [*596] [*597]

(*a*) Reversed on error: Wilson *v.* Fuller, 3 Q. B. 68, 109 (E. C. L. R. vol. 43), 3 Gale & D. 570.

(*b*) See Udell *v.* Atherton, 4 Law Times, N. S. 797. There, a principal authorized his agent to sell a log of mahogany. The agent fraudulently concealed from an intended purchaser a defect in the log, who, upon the agent's assurance that it was sound and worth 6*s.* or 4*s.* a foot, bought it at 3*s.* a foot. The log was delivered to the purchaser, and paid for by two bills given to the principal, which were paid at maturity. The log was sawn up and partly used by the purchaser, who then discovered it to be hollow and defective, and almost valueless. The principal did not in any way whatever authorize, nor had he any knowledge of, the fraud practised by the agent until the transaction was completed; *but the principal had all the benefit of the contract.* In an action of deceit by the purchaser against the principal, it was held by Pollock, C. B., and Wilde, B., that the defendant was liable, and by Martin, B., and Bramwell, B., that he was not.

The judgment of Wilde, B., in that case will well repay an attentive perusal. And see Fitzsimmons *v.* Joslin, 21 Vermont R. 129, cited in Story's Equit. Jurisprudence, § 193 *a.*

offered for sale, and gives the direction respecting his sale, I think he thereby becomes the accredited agent of his master; and what he said at the time of the sale, as part of the transaction of selling, respecting the horse, is evidence." And again: "The master having intrusted the servant to sell, he is intrusted to do all that he can to effectuate the sale; and, if he does exceed his authority in so doing, he binds his master." The same learned judge, in Alexander v. Gibson, 2 Campb. 555, says: "If the servant was authorized to sell the horse and to receive the stipulated price, I think he was incidentally authorized to give a warranty of soundness. It is now most usual, on the sale of horses, to require a warranty; and the agent who is employed to sell, when he warrants the horse, may fairly be presumed to be acting within the scope of his authority. This is the common and usual manner in which the business is done: and the agent must be taken to be vested with power to transact the business with which he is intrusted in the common and usual manner. I am of *opinion, therefore, that, *598] if the defendant's servant warranted this horse to be sound, the defendant is bound by the warranty." [ERLE, C. J.—That case is directly in point. WILLIAMS, J.—A warranty of *soundness* may be usual: but it is a very different question whether a warranty that the horse is "quiet in harness," or "fit for a lady to drive," is so.] In Pickering v. Busk, 15 East 38, a purchaser of hemp lying at wharfs in London had, at the time of his purchase, the hemp transferred in the wharfinger's books into the name of the broker who effected the purchase for him, and whose ordinary business it was to buy and sell hemp; and this was held to give the broker an implied authority to sell it, and that his sale and receipt of the money bound his unknown principal. Bayley, J., there says: "It may be admitted that the plaintiff did not give Swallow (the broker) any express authority to sell; but an implied authority may be given: and, if a person put goods into the custody of another, whose common business it is to sell, without limiting his authority, he thereby confers an implied authority upon him to sell them. Swallow was in the habit of buying and selling hemp for others, concealing their names. And now the plaintiff claims a liberty to rescind the contract, because no express authority was given to Swallow to sell. But, is it competent to him so to do? If the servant of a horse-dealer, with express directions not to warrant, do warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed." There can be no difference in principle between the case of a horse-dealer and that of any other person. That the representations made by Greig amounted to a warranty, is clear from Cave v. Coleman, 3 M. & R. 2. Reliance was *placed, on moving for the rule, upon the dictum of Ashhurst, *599] J., in Fenn v. Harrison, 3 T. R. 757, where, adverting to the case put in argument of the sale of a horse, that learned judge says: "I take the distinction to be, that, if a person keeping livery stables,(a) and having a horse to sell, directed his servant not to warrant him, and the servant did nevertheless warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cogni-

(a) *i. e.*, "being a horse-dealer."

sant of any private conversation between the master and servant. But, if the owner of a horse were to send a stranger to a fair with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment." That dictum was in 1790; whereas the two cases before Lord Ellenborough occurred in 1803 and 1811. In Woodin *v.* Burford, 2 C. & M. 391,† the sale was complete before the servant had anything to do with the transaction: what he said at the time of *delivering* the horse, therefore, was properly held to be immaterial. That is the ground upon which Bayley, B., puts the decision: the case, therefore, is no authority for the position contended for by the defendant here. The language of Mr. Justice Buller,—Bul. N. P. 31 *a*,—is much to the purpose: "If a merchant sell one kind of silk for another, whereby the purchaser is imposed upon in the value, he may bring his action; and though it appear upon evidence that there was no actual deceit in the merchant, but that it was in the factor beyond sea, yet it will be *sufficient [*600 to charge the defendant: for, he shall be answerable for the deceit of his factor civiliter, though not criminaliter; for, since somebody must be a loser, it is more reasonable that he that puts the trust and confidence in the deceiver should be the loser, than the stranger,"—Hern *v.* Nicholl, 1 Salk. 289. In Bacon's Abridgment, *Master and Servant* (K), it is said that "the reason why the acts of a servant are in many instances esteemed the acts of the master, arises from the relation between a master and servant; for, as in strictness everybody ought to transact his own affairs, and it is by the favour and indulgence of the law that he can delegate the power of acting for him to another, it is highly reasonable that he should answer for such substitute at least civiliter, and that his acts, being pursuant to the authority given him, should be deemed acts of the master." And in Addison on Torts, p. 657, it is said, that, "If a fraudulent act has been committed by an agent without the knowledge of the principal, and the latter afterwards adopts the act, and takes the benefit of the fraud, he will be responsible in damages to the party who has been deceived and injured by the fraudulent act,"—citing Wright *v.* Crooks, 1 Scott N. R. 685;—"but, if he repudiates the transaction as soon as he becomes acquainted with the fraud, and shuns all participation therein, he will not be responsible for the fraud if it was committed by the agent without his sanction and authority, and the representation was not within the scope of the ordinary authority of an agent acting in such a matter,"—citing Grant *v.* Norway, 10 C. B. 688 (E. C. L. R. vol. 70).

Montagu Chambers, Q. C., and *Denman*, in support of the rule.—The issue here is, whether Greig, who was authorized by his master to sell this horse, had incidentally an authority to warrant it not merely to be sound, but to be free from vice, quiet to ride and to *drive, [*601 and fit to be driven or ridden by a lady! The material facts are these:—The defendant, who is a potato-salesman in London, and who possesses a farm in Essex, having bought a horse, sent it to the farm to be turned out,—not to be used for farming purposes, not for sale. A veterinary surgeon, who was on the look out for a horse of this description, seeing it, asked Greig, the defendant's bailiff, if his master

would sell it. Greig accordingly communicates with his master, who says he will not take less than 30 guineas for the horse: and ultimately the horse is sold by Greig, he at the time, having no authority from his master to do so, making the representations respecting the horse which have been alluded to. Now, it was clearly no part of the defendant's business to sell horses; nor was it any part of the duty of Greig as bailiff to hold himself out as having authority to sell horses for his master, and to warrant them. All the cases and all the text-writers make a marked distinction between the case of the servant of a private individual and that of the agent or servant of a trader or merchant acting for him in the course of his business. Helyear *v.* Hawke, 5 Esp. N. P. C. 72, is not an authority upon which any reliance can be placed: neither is Alexander *v.* Gibson, 2 Campb. 555. On Fenn *v.* Harrison, 3 T. R. 757, being referred to in argument in The Bank of Scotland *v.* Anderson, 1 Dow. P. C. 40, 44, Lord Eldon, C., says: "If Justice Buller had a horse to sell, and thought he would be bound by the warranty of his servant, though desired not to warrant, he would have gone to market himself to see his horse sold. But the judges appeared to have made a distinction between horse-dealers and others. If Tattersal sent his servant to sell, and the servant, contrary to his instructions, warranted, Tattersal might be bound: but another person (not a horse-dealer) would not be bound by the unauthorized warranty of *either Tattersal or his servant, or of his own servant, he having only given a particular authority." Most of these authorities are cited in Coleman *v.* Riches, 16 C. B. 104 (E. C. L. R. vol. 81), where it was held that a master is civilly responsible for the fraud or negligence of his servant acting in the course of his employment; but not for an act of wilful fraud or negligence done by him out of the scope of his authority, or inconsistent with the course of his employment. In Story on Agency, § 132, it is said: "It has been said, that, if a person keeping a livery-stable, and having a horse to sell, intrusts a servant with power to sell the horse, and directs him not to warrant the horse, and the servant nevertheless upon the sale should warrant him, the master would be bound by the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognisant of any private conversation between the master and the servant. But, if the owner of a horse should send the horse to a fair by a stranger, with express directions not to warrant him, and the latter should on the sale, contrary to his orders, warrant him, the owner would not be bound by the warranty." And in § 133 it is said, that, "where the agency is not held out by the principal, by any acts, or declarations, or implications, to be general in regard to the particular act or business, it must from necessity be construed according to its real nature and extent; and the other party must act at his own peril, and is bound to inquire into the nature and extent of the authority actually conferred." The doctrine of Pickard *v.* Sears, 6 Ad. & E. 469 (E. C. L. R. vol. 33), 2 N. & P. 488, which has been adverted to, has no application to the case of a special agent. In Hern *v.* Nichols, 1 Salk. 288, and that class of cases, the agent was put in a position to deceive those who dealt with him. In no case has it ever been held that a private individual *who gives a special authority to an agent to sell an article clothes him with authority to bind him by a warranty. In

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Whitehead *v.* Tuckett, 15 East 400, 407, Scarlett, in argument, refers to a MS. case in 1792 or 3, to the following effect,—"A servant was sent with a horse to a fair, with an express order from the master not to sell it under a certain sum: the servant, notwithstanding, sold it for a less sum; upon which the master immediately gave notice, and brought trover against the purchaser: and it was held that he might recover, because the servant was not his general agent." And see Chitty on Contracts, 6th edit. 197 et seq., Smith's Mercantile Law, 4th edit. 121, Story on Agency, § 59, and note 4, and Manley Smith on Master and Servant, pp. 128–130. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court:—

Upon this rule to set aside the verdict for the plaintiff and enter it for the defendant on the plea denying the warranty of a horse, the question has been whether the warranty by the defendant was proved. The jury have found that Greig, in selling the horse for the defendant, warranted it to be sound and quiet in harness. The defendant stated, and it must on this motion be taken to be true, that he did not give authority to Greig to give any warranty. The relevant facts are, that the plaintiff applied to the defendant, who is not a dealer in horses, but a tradesman with a farm, to sell the horse; and that the defendant sent his farm-bailiff, Greig, with the horse, to the plaintiff, and authorized him to sell it for thirty guineas.

The plaintiff contends that an authority to an agent to sell and deliver imports an authority to him to warrant.

*The subject has been frequently mentioned by judges and text-writers; but we cannot find that the point has ever been [*604 decided. It is therefore necessary to consider it on principle.

The general rule, that the act of an agent does not bind his principal unless it was within the authority given to him, is clear. But the plaintiff contended that the circumstances created an authority in the agent to warrant, on various grounds,—among others, he referred to cases where the agent has by law a general authority to bind his principal, though as between themselves there was no such authority, such as partners, masters of ships, and managers of trading business; and stress was laid on the expressions of several judges, that the servant of a horse-dealer or livery-stable keeper can bind his master by a warranty, though, as between themselves, there was an order not to warrant: see Helyear *v.* Hawke, 5 Esp. N. P. C. 72, Alexander *v.* Gibson, 2 Campb. 555, Fenn *v.* Harrison, 3 T. R. 757. We understand those judges to refer to a general agent employed for a principal to carry on his business, that is, the business of horse-dealing; in which case there would be by law the authority here contended for. But the facts of the present case do not bring the defendant within this rule, as he was not shown to carry on any trade of dealing in horses.

It was also contended that a special agent, without any express authority in fact, might have an authority by law to bind his principal; as, where a principal holds out that the agent has such authority, and induces a party to deal with him on the faith that it is so. In such a case the principal is concluded from denying this authority, as against the party who believed what was held out, and acted on it: see Pickering *v.* Busk, 15 East 38. But the facts do not bring the defendant within this rule.

*605] *The main reliance was placed on the argument that an authority to sell is by implication an authority to do all that in the usual course of selling is required to complete a sale; and that the question of warranty is in the usual course of a sale required to be answered, and that therefore the defendant by implication gave to Greig an authority to answer that question, and to bind him by his answer. It was a part of this argument that an agent authorized to sell and deliver a horse is held out to the buyer as having authority to warrant. But on this point also the plaintiff has in our judgment failed.

We are aware that the question of warranty frequently arises upon the sale of horses; but we are also aware that sales may be made without any warranty or even an inquiry about warranty. If we laid down for the first time that the servant of a private owner intrusted to sell and deliver a horse on one particular occasion is therefore by law authorized to bind his master by a warranty, we should establish a precedent of dangerous consequence: for, the liability created by a warranty extending to unknown as well as known defects, is greater than is expected by persons unexperienced in law; and, as everything said by the seller in the bargaining may be evidence of warranty to the effect of what he said, an unguarded conversation with an illiterate man sent to deliver a horse may be found to have created a liability which would be a surprise equally to the servant and the master. We therefore hold that the buyer taking a warranty from such an agent as was employed in this case, takes it at the risk of being able to prove that he had the principal's authority: and, if there was no authority in fact, the law from the circumstances does not in our opinion create it.

*606] When the facts raise the question it will be time *enough to decide the liability created by such a servant as a foreman alleged to be a general agent, or such a special agent as a person intrusted with the sale of a horse in a fair or other public mart, where stranger meets stranger, and the usual course of business is for the person in possession of the horse, and appearing to be the owner, to have all the powers of an owner in respect of the sale. The authority may under such circumstances as are last referred to be implied, though the circumstances of the present case do not create the same inference. It is unnecessary to add, that, if the seller should repudiate the warranty by his agent, it follows that the sale would be void, there being no question raised upon this point. Judgment for the defendant.

FIELDER v. MARSHALL. *Feb.* 2.

An instrument purporting on the face of it to be a bill of exchange drawn by A., payable to the plaintiff or order, was accepted by B., and handed to the plaintiff in satisfaction of a claim for rent due to her from A. In the place where the direction to the drawee is usually found, the name and address of the payee were inserted. The whole instrument (except the drawer's name) was in the handwriting of B.:—Held, that the payee was entitled to recover upon it as a promissory note.

THIS was an action against the defendant as the acceptor of a bill of exchange in the following form:—

"50, King William Street, London Bridge,
"March 24, 1860.

"Two months after date pay to Mrs. Emma Fielder or order thirty-five pounds, value received.

"Accepted, payable at 50 King William Street, City, "SAMUEL MARSHALL."

"ANN LANGSTAFF."

"To Mrs. Emma Fielder,
"Nelson Lodge, Trafalgar Square, Chelsea."

The instrument was declared on as a bill drawn *upon and accepted by the defendant,—the declaration also containing a count upon an account stated. [*607

The defendant pleaded a plea in denial of the acceptance, and also never indebted: upon which issue was joined.

The cause was tried before Cockburn, C. J., at the last Summer Assizes for Surrey, when it was proved by the plaintiff's son, that Mrs. Langstaff (who was the defendant's aunt) was tenant to the plaintiff in March last; that 35*l.* being due for rent, and Mrs. Langstaff being in the act of removing her goods, the witness demanded the rent, when the defendant, who was present, proposed to give a bill for the amount, and accordingly a stamp was procured which the defendant filled up, leaving a blank only for the signature of the drawer; that the defendant then left the room, and presently brought the bill back signed; that a week after the bill became due and was dishonoured the witness called upon the plaintiff, when he promised to pay that day fortnight; but that the bill remained unpaid. It was contended on the part of the defendant, that, inasmuch as he was not the person to whom the bill was addressed, he could not be liable thereon as the acceptor: and Davis *v.* Clarke, 18 Law J., Q. B. 305, was relied on.

A verdict having been found for the plaintiff,

Needham, in Michaelmas Term last, pursuant to leave reserved, obtained a rule nisi to enter a nonsuit "on the ground that the defendant was not liable as acceptor of the bill, not being the party to whom the bill was addressed; and also that the defendant was not liable on the evidence under the account stated, there being no consideration for the promise, and no count upon the consideration of the bill, and no power to insert in the declaration a count upon an *account stated under the rules of Michaelmas Term, 1855, and Hilary Term, 1858, [*608 the action having been brought under the Bills of Exchange Act, 155, 18 & 19 Vict. c. 67."

Joyce now showed cause.—In the case of Davis *v.* Clarke, 18 Law J., Q. B. 305, which was cited on the trial, and will no doubt be relied on for the defendant to-day, the instrument was drawn payable to the drawer or his order, and addressed "to Mr. John Hart," and the acceptance was "Accepted, H. J. Clarke." And, when Lord Denman says that "there is no authority in the general law, or in the usage of merchants, as affecting bills of exchange, which enables a person to whom a bill is not addressed to accept it, unless he accept for honour," —he must be taken to refer to a case where the supposed acceptor and the party to whom the instrument purports to be directed are different

persons. Here, the words in the corner are evidently not intended as a direction to Mrs. Emma Fielder as the person upon whom the bill is drawn: and it must be borne in mind that the whole of the document (except the drawer's signature) was written by the defendant himself. The count upon an account stated is at all events available. [WILLES, J.—This is an undertaking for the debt of a third person. If, therefore, there is no liability upon the instrument itself, there can be none aliundè.] If not available as a bill of exchange, the document may well enure as a promissory note: Peto *v.* Reynolds, 9 Exch. 410.† There, there was no direction to any one; and it was held by Parke, B., Alderson, B., and Martin, B., that, if not a bill of exchange, it was clearly a promissory note, if there was evidence of an absolute promise to pay it. Here, there was evidence of an absolute promise to pay.

*609] [WILLIAMS, J.—In that case there was no drawee *named.] Neither is there here. The words at the foot "To Mrs. Emma Fielder," are a mere repetition of the name of the payee, with her address. In Armfield *v.* Allport, 27 Law J., Exch. 42, it was held that an instrument drawn in the form of a bill payable to bearer, even if accepted in blank, and afterwards filled up by the drawer, may be declared upon by the endorsee as a promissory note made by the drawer and endorsed by the drawee. [WILLES, J.—In Miller *v.* Thompson, 3 M. & G. 576 (E. C. L. R. vol. 42), 4 Scott N. R. 204, it was held by this court, that an instrument in the form of a bill of exchange, drawn upon a joint stock bank by the manager of one of its branch banks, by order of the directors, may be declared upon as a promissory note. Tindal, C. J., in giving judgment, says: "It appears that the directors for whom the instrument in question purports to be drawn by their manager, are members of the company whose name and character are presented on the face of it, and that the company is not a corporation, but a mere private association. We must therefore look upon it as an instrument drawn by one of several members of a firm purporting that the sum therein mentioned shall be paid by the firm at a given time and place. In effect it is a promissory note, and nothing else. To constitute a bill of exchange, it is essential that there should be two parties, a drawer, and a person upon whom the bill is drawn. I am clearly of opinion that this is a promissory note." If there be sufficient on the face of the instrument to indicate a promise to pay, it is a promissory note.]

Grant, in support of the rule.—To constitute a good bill of exchange, there must be a drawee as well as a drawer. [ERLE, C. J.—If the words in the corner of the bill are not to be taken as a direction to a drawee,

*610] the defendant is estopped from taking that objection.] *This is clearly not a bill of exchange; and, if a promissory note, there should have been a presentment and notice of dishonour, the defendant being only surety for the debt of Mrs. Langstaff. If void as a bill, it would not be evidence of an account stated. A bare judgment is not evidence of an account stated. [WILLES, J.—There was ample consideration for the promise; the plaintiff was induced to abstain from distraining for the rent due.]

ERLE, C. J.—I am of opinion that this rule must be discharged. The instrument declared on has the appearance of being a bill of exchange addressed to Emma Fielder, who is the payee, and accepted by

the defendant. The evidence is, that Mrs. Langstaff being indebted to the plaintiff for rent, the latter was induced to allow her goods to be removed upon the bill being handed over to her as security. The whole of the instrument, with the exception of the drawer's name, was in the handwriting of the defendant, and the defendant himself accepted it. Under these circumstances, it appears to me that the right way to deal with it is, to treat the direction to "Mrs. Emma Fielder" at the foot of the bill as a mere informal repetition of the words in the body of it "pay to Mrs. Emma Fielder." The effect of so construing it is, that the defendant, who accepts the bill, thereby promises to pay the amount at maturity to Emma Fielder. Feeling that we are at liberty so to construe the instrument, I have much satisfaction in giving effect to what must have been the intention of the parties by holding that the plaintiff is entitled to recover.

WILLIAMS, J.—I also am of opinion that this rule must be discharged. If the instrument in question had been really directed to a third party, and the *defendant had written his name across it as acceptor, there would have been some difficulty in the case. But I concur [*611 with my Lord in thinking that the apparent direction in the corner "To Mrs. Emma Fielder" is not to be looked at as a direction to a person upon whom the bill is drawn, but as a mere repetition of the promise in the body of the instrument to pay the sum therein mentioned to that individual or her order. Without, therefore, going into the question whether the instrument may be regarded as a bill of exchange, —which the case of Peto *v.* Reynolds, 9 Exch. 410,† seems to negative,—I am clearly of opinion that the plaintiff is entitled to recover on the footing of its being a promissory note.

WILLES, J.—I am of the same opinion. Taking the whole of the instrument together, it is clear that this is to be treated as a case, in which that which is written at the foot is a mere indication that payment is to be made to Mrs. Emma Fielder. It is clear that it is not a *direction* of the bill to Mrs. Fielder, but a mere repetition of that which is contained in the body of the instrument, viz., that payment is to be made to her or to her order. It is therefore a case in which there is an absence of direction to any one. And if, by reason of the law-merchant, that cannot be a bill of exchange, the only result is, that, according to the case of Miller *v.* Thompson, 3 M. & G. 576 (E. C. L. R. vol. 42), 4 Scott N. R. 204, we must treat it as a promissory note.

KEATING, J.—I also think this instrument may be treated as a valid promissory note, and therefore that this rule must be discharged.

Rule discharged.

*GRUBB *v.* THE ENCLOSURE COMMISSIONERS FOR ENGLAND AND WALES. *Jan.* 29. [*612

It is competent to the enclosure commissioners, under the 8 & 9 Vict. c. 118, to order the valuer to set out a private or occupation road over land directed by the provisional order to be allotted to an individual in lieu of his rights in the lands to be enclosed, unless the provisional order expressly declares that his allotment shall be exempt from such a burthen.

BOVILL, Q. C., on a former day, obtained a rule nisi to set aside a writ of prohibition issued out of the petty-bag office prohibiting the en-

closure commissioners from confirming an award about to be made by them in the matter of a certain enclosure.

It appeared from the affidavits upon which the motion was founded, that an application having been made to the enclosure commissioners by Lord Carrington and the plaintiff, Mr. Edward Grubb, to sanction the enclosure of certain lands of the manor of Hughenden, in the county of Buckingham, and the usual proceedings under the enclosure acts having been taken, the commissioners, on the 5th of June, 1856, issued their provisional order in the following terms:—

"Whereas persons interested in certain lands called or known as Naphill Common, Green Hill, Piggott's Common, Denner Hill Common, Spring Coppice and Driftway, Denner Hill Coppice, Willow Coppice, High Coppice, and Chapel Hill, Bryant's Bottom, including bottom of Widdenton Hill, and North Dean Bottom, and in the common fields called Longridge and The Tupps, all situate in the parish of Hughenden, in the county of Buckingham, being land subject to be enclosed under the provisions of the acts for the enclosure, exchange, and improvement of land, and proposing to enclose the same under the said acts, have made due application to the enclosure commissioners for England and Wales to sanction such enclosure: And whereas it has been made to appear to the said commissioners that the persons making the said application represent at least one-third in value of the interest in
*613] the said lands: *And whereas the said commissioners, on the statements contained in the said application, thought the enclosure of the said lands might be found to be expedient, and accordingly referred the said application to Nathan Wetherell, Esq., an assistant commissioner duly appointed under the said acts: And whereas the said assistant commissioner, after having caused due notice to be given as required by the said acts, and having inspected the said lands, held, pursuant to the said notice, a meeting on the 21st day of April last, at the Red Lion Inn, High Wycombe, to hear any objections which might be made to the said proposed enclosure, and any information or evidence which might be offered in relation thereto, and inquired into the correctness of the statements in the said application, and otherwise into the expediency of the said proposed enclosure: And whereas the said assistant commissioner duly reported in writing to the said commissioners the result of his inquiries as to the statements contained in the said application, and his opinion as to the expediency of the said proposed enclosure, with his reasons for such opinion, and annexed to his report a sketch of the said lands: And whereas we the said commissioners are of opinion that the said proposed enclosure would be expedient, and, in case the necessary consents be given, and the requisites of the said acts be otherwise complied with, intend to certify in our annual general report the expediency of such enclosure, upon the terms hereinafter mentioned:

"Now, therefore, in pursuance of the power given to us by the said acts, we, the enclosure commissioners for England and Wales, do by this provisional order under our seal declare the following to be the terms and conditions on which we are of opinion that the said proposed enclosure should be made, that is to say,—

*614] "That three acres at or near the spot marked A. on *the plan hereunto annexed be allotted for the purposes of exercise and recreation:

"That two acres at or near the spot marked B., two acres at or near the spot marked C., and two acres at or near the spot marked D. on the said plan be allotted for the labouring poor:

"That Pigott's Common and part of Spring Coppice, containing together 27*a.* 3*r.* 30*p.*, High Coppice, 21*a.* 0*r.* 26*p.*, North Dean Bottom, 3*a.* 3*r.* 27*p.*, Willow Coppice, 20*a.* 3*r.* 34*p.*, Driftway, 2*a.* 2*r.* 21*p.*, and Spring Coppice, 63*a.* 0*r.* 4*p.*, together with all wood and underwood now growing on such tracts, and on all other tracts proposed to be enclosed except Naphill Common, Green Hill, and the common fields, be allotted to Edward Grubb, Esq., in lieu of his right and interest in the lands to be enclosed:

"That Chapel Hill, Bryant's Bottom, Denner Hill Coppice, bottom of Widdenton Hill, and Denner Hill Common, containing together 69*a.* 1*r.* 8*p.*, be allotted as follows, that is to say, an allotment equal in value to one-seventh part thereof, after deducting the allotment of two acres for the labouring poor, and the allotments (if any) for defraying the expenses of the enclosure, be made to the Right Hon. Benjamin Disraeli in lieu of his right and interest in the soil of the said tracts and in all substrata under the same, and that the residue of the said tracts be allotted among the commoners in proportion to their respective common rights:

"That the allotment to be made to the said Benjamin Disraeli as aforesaid be set out upon the common nearest to his property at Naphill:

"That an allotment of one-sixteenth part in value of Naphill Common and of Green Hill, or of so much thereof as is waste of the manor of Hughenden, be made to the said Benjamin Disraeli in lieu of his right *and interest in the soil of such waste and in all substrata under the same: [*615

"That, in regard to such portions, if any, of the said Naphill Common and Green Hill as are not waste of the said manor of Hughenden, an allotment of one-sixteenth part in value thereof be made to the owner or respective owners of the soil of such portions in lieu of their or his right and interest in the soil and in all substrata:

"And that the residué of the said Naphill Common and Green Hill be allotted among the parties entitled to rights of common or pasturage thereon. In witness," &c.

The said enclosure was subsequently sanctioned and directed to be proceeded with by the sessional act of 19 & 20 Vict. c. 106; and, after the passing of that act, at a meeting of the persons interested in the land to be enclosed, one William Brown was duly appointed valuer in the matter of the said enclosure.

On the 31st of March, 1859, Brown made his report as such valuer to the commissioners: and, at a meeting held by the assistant commissioner on the 30th of November, 1859, for the purpose of hearing objections to the valuer's report, one Roger Williams, to whom lands were to be allotted according to the terms of the provisional order, applied to have a private carriage road set out for him, under the provisions of the 68th section of the 8 & 9 Vict. c. 118, over Piggott's Common, being part of the land to be allotted to Mr. Grubb; whereupon Grubb objected thereto and contended that the provisional order vested his allotments in him exempt from all jurisdiction of the valuer over them except for the purpose of awarding them. The assistant commissioners overruled

the objection, on the ground that the lands to be allotted to Mr. Grubb
*616] according to the terms of the provisional order, were *lands still subject to be enclosed within the meaning of the Enclosure Act, and that there was nothing in the act to take them out of the jurisdiction of the valuer, or to preclude him from dealing with them in the course of such enclosure in the same manner as with other allotments, so long as such dealing was not inconsistent with such order: and the assistant commissioner, being of opinion that the application of Williams was reasonable and well founded, reported to the commissioners accordingly.

The commissioners having subsequently directed the valuer to set out such private road over Piggott's Common, and the same having accordingly been staked out, Mr. Grubb sued out a writ of prohibition.(*a*)

Bovill, Q. C., on behalf of the commissioners, on a former day in this term, obtained a rule nisi to set aside the writ, with costs.

Lush, Q. C., and *Couch*, now showed cause.—The question is whether the enclosure commissioners can, after they have by a provisional order allotted specific land to an individual in lieu of his rights in the land to be enclosed, direct the valuer to set out a private or occupation road over the land so allotted. That will depend upon the construction of several sections of the Enclosure Act, 8 & 9 Vict. c. 118. The course of proceeding to obtain the enclosure waste lands is as follows:—If a given proportion of parties having rights over the land agree, a memorial is sent to the commissioners. If the proposal meets the approbation of the commissioners, they prepare a scheme, and if that scheme is
*617] agreed to by a certain proportion in number *and interest, the commissioners report to parliament annually. The details of the enclosure are intrusted to an officer called a valuer, who is appointed by the commissioners, and who regulates the boundaries, sets out the roads, &c., subject to appeal to the commissioners. By the 25th section of the act, it is provided, that, upon application to the commissioners, an assistant commissioner is to be directed to inquire into the expediency of the proposed enclosure. The duties of the assistant commissioner are defined by s. 26, which enacts that "the assistant commissioner to whom such application shall be referred shall report in writing to the commissioners the result of his inquiries as to the statements contained in the application, and his opinion as to the expediency or inexpediency of the proposed enclosure, with the reasons for such opinion; and, in case he shall think such enclosure expedient, he may specify any terms or conditions which may appear to him to be proper for the protection of any public interests and of any mineral property or peculiar rights in relation to the land proposed to be enclosed, and shall annex to his report a map or sketch of the land proposed to be enclosed," &c. The 27th section enacts, that, "if, on the report of the assistant commissioner, or after any further inquiries they shall think necessary in relation thereto, the commissioners shall be of opinion, having regard as well to the health, comfort, and convenience of the inhabitants of any cities, towns, villages, or populous places in or near any parish in which the land proposed to be enclosed or any part thereof shall be situate, as to the advantage of the proprietors of the land to which such application shall relate, that the proposed enclosure would be expedient, the commis-

(*a*) Under the 12 & 13 Vict. 109. See In re Baddely, 4 Exch. 508.†

sioners, by provisional order under their seal, shall set forth the terms and conditions on which they shall be of opinion that the *enclosure should be made, and especially the quantity and situation [*618 of the allotments (if any) which under the provisions of this act should be appropriated for the purposes of exercise and recreation and for the labouring poor, and, in case the lord of the manor shall be entitled to the soil of the land proposed to be enclosed, shall specify the share or proportion of the residue of the land which, after provision made for the payment of expenses, in case the expenses shall under the provisions hereinafter contained be so directed to be paid by sale of land, and after deducting the allotments to be made for public purposes, should be allotted to the lord of the manor in respect of his right and interest in the soil, either exclusively or inclusively of his right or interest in all or any of the mines, minerals, stone, and other substrata under such land, and inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord or his tenants, or any other right or interest of such lord in the land to be enclosed as the case may appear to the commissioners to require, or as the parties interested, with the approbation of the commissioners, may have agreed; and, in case there shall be any mineral property, or any rights in relation thereto, not vested in the lord of the manor, or other rights which shall appear to the commissioners proper to be specially provided for upon such enclosure, or to be excepted from the operation thereof, shall specify the provisions or exceptions which should be made in that behalf; and the commissioners shall thereupon cause notice to be given of their intention to authorize the proposed enclosure, or (as the case may be) to certify in their annual general report the expediency of the proposed enclosure, but upon the terms and conditions in such order expressed, and in case the consents required by this act should be given within the time *in such notice specified, or within any enlarged time which the [*619 commissioners may allow for that purpose; and the commissioners shall cause to be deposited for inspection a copy of such provisional order in the parish or place in which the land proposed to be enclosed, or some part thereof, shall be situate, and may, in case they shall think fit, cause meetings to be holden by an assistant commissioner for the purpose of taking consents or dissents, or of ascertaining the interests of consenting or dissenting parties, or give such directions as to the mode of taking and verifying consents as they shall think fit; and, in case it shall appear to the satisfaction of the commissioners that persons the aggregate amount of whose interests in the land proposed to be enclosed shall not be less in value than two-thirds of the whole interest in such land, and the other persons, if any, whose consents may be necessary under the provisions hereinafter contained, shall have consented to such enclosure upon the terms and conditions in such order expressed, then, if the land proposed to be enclosed cannot be enclosed under this act without the previous direction of parliament, the commissioners shall in their next annual general report certify their opinion that the proposed enclosure would be expedient, with such particulars in relation thereto, or to the terms and conditions aforesaid, as they shall think necessary; and, in case the land proposed to be enclosed shall be land to the enclosure of which under this act the previous direction of parliament is not hereby required, the commissioners shall cause notice

to be given on the church door and by advertisement of their intention to proceed with such enclosure under the provisions herein contained." Then follows a proviso for the rights of freemen, burgesses, or inhabitant householders of any city, borough, or town. The 32d section enacts, *620] that *"in case by any act of parliament hereafter to be passed it shall be enacted that the enclosures the expediency of which shall have been certified by the commissioners in their annual general report as aforesaid, or any of them, be proceeded with, the same shall in every case be proceeded with and completed according to the provisions of this act, and *on the terms and conditions in the provisional order of the commissioners specified* in that behalf." The 33d section relates to the appointment of the valuer; and the 34th contains his instructions: it enacts, that, "at the meeting for appointing a valuer, or at some other meeting called by the commissioners for the purpose, the persons present by themselves or their agents at such meeting, or the majority in number and in respect of interest of such persons, may resolve upon instructions to the valuer *not inconsistent with the terms and conditions of the provisional order of the commissioners*, and of any act hereafter to be passed by which the enclosure may have been authorized, for the appropriation of parts of the land proposed to be enclosed for such public purposes as hereinafter mentioned, or any of them,"—amongst others,—"for the formation of public roads and ways; for widening and improving existing public roads and ways; for the formation of public drains, &c.; or for any other purpose of public utility or convenience, or for the general convenience or accommodation of the persons interested in the land to be enclosed; and also upon instructions to such valuer for the formation, alteration, or improvement on the land to be enclosed of private or occupation roads and ways, common ponds, ditches, watercourses, embankments, tunnels, bridges, and fences, or any of them, or any other works for the improvement of such land, or for the convenience of the occupiers of the respective allotments *621] thereof." The 61st section empowers "the *valuer acting in the matter of any enclosure to set out and make such common ponds, ditches, watercourses, embankments, tunnels, and bridges, of such extent and form and in such situations as he shall deem necessary, *and as shall not be inconsistent with the terms and conditions and instructions hereinbefore mentioned*, in the land to be enclosed," &c. And the 68th section empowers the valuer acting in the matter of any enclosure to "set out such *private or occupation roads* or ways through the lands to be enclosed as he shall think requisite, for the use of the persons interested in such lands, or any of them," &c. Taking the 34th, the 61st, and the 68th sections together, it was clearly the intention of the legislature that the whole proceedings of the valuer should be controlled by the provisional order and the instructions: and it is manifestly inconsistent with the terms of the provisional order and of the agreement on which it is founded for the commissioners to sanction the making of any roads or other works public or private over the lands so allotted. The same restrictive words are found in the 73d and 77th sections. It is equally an injury to the allottee whether the land is taken for a public or a private or occupation road, or a public pond, &c. And, if the commissioners were at liberty to do this as to Mr. Grubb's allotments, they might do so on the allotments made for the benefit of the public or the

labouring poor, and so render a most important provision of the act nugatory. Indeed, by unduly multiplying the roads thereon, the allottee might be substantially deprived of the entire benefit of his allotment. If the commissioners had meant to reserve to the valuer the power of setting out public or private roads over Mr. Grubb's allotment, they should have said so in the order. The terms on which the allotment is made to Mr. Grubb, are, that he shall enjoy certain *closes described by name and dimensions, in severalty. Mr. Grubb is [*622 clearly entitled to the whole benefit of the land so directed to be allotted to him unencumbered by any rights over it, whether public or private. [WILLIAMS, J.—A case arising out of this same enclosure was tried before me at Aylesbury some time since. It was an action of trespass brought by Mr. Grubb against the valuer for entering upon the lands allotted to him, for the purpose of surveying and making a map of the enclosures, pursuant to the 123d section of the statute. Mr. Grubb contended that the land was absolutely vested in him by the provisional order. I, however, ruled that the land still continued to be land to be enclosed and dealt with under the powers of the enclosure acts, and therefore that the valuer had a right to go upon it. A motion was afterwards made to the Court of Queen's Bench against my ruling: but the court refused a rule.](a) There was no attempt there, as there is here, to deal with the land allotted in a manner that was inconsistent with the terms and conditions of the provisional order. Could the commissioners *sell* part of the lands allotted to Mr. Grubb for payment of the expenses of the enclosure? The only provision in the act for any alteration in the allotments, is contained in s. 101, which enacts "that it shall be lawful for the valuer acting in any enclosure, at any time before the confirmation of the award, with the approbation or by the direction of the commissioners, to make any alterations which he may think right and expedient in the allotments or in the fences which he may have set out and ordered, or in the private roads he may have set out, or in any of the orders or directions relating thereto which he may have made in the matter of such enclosure; and, in case any person *shall be injured by any such alteration, on account of any expenses he may have incurred, or otherwise, the valuer shall ascer- [*623 tain and determine what recompense should be made to him for such injury, and shall either pay the amount thereof out of the moneys raised for the expense of the enclosure, or shall direct by whom and in what manner such recompense shall be made," &c. But this case is not within that section; for, the valuer had no right to interfere with any of the lands dealt with by the provisional order. If the court should think the matter even doubtful, Mr. Grubb should be allowed to declare in prohibition, so that he may if necessary have an appeal. [WILLIAMS, J.—If your argument is correct, Mr. Grubb may have an action for the trespass to his land: whereas, if we decline to set aside the writ of prohibition, the commissioners are concluded.] The award will be conclusive evidence against Mr. Grubb, when made,—s. 105.

Bovill, Q. C., and *F. M. White*, in support of the rule.—The question is whether Mr. Grubb is entitled to his allotment free from *existing* private or occupation roads; for, that is the effect of the argument on the other side, inasmuch as the 68th section at the close of it provides,

(a) Grubb v. Brown, 32 Law Times 89.

that, "after such setting out as aforesaid, all private or occupation roads or ways over, through, and upon the lands to be enclosed, which shall not be set out as aforesaid, shall be for ever stopped up and extinguished." The act places certain restrictions on the powers of the valuer,—the whole of whose acts, be it remembered, are subject to the control of the commissioners on appeal. As to public roads, ponds, bridges, &c., those powers are to be exercised in a manner "not inconsistent with the terms and conditions of the provisional order of the commissioners, and of any act thereafter to be passed by which the
*624] enclosure may have been *authorized." But the 68th section, which relates to private or occupation roads and ways through the lands to be enclosed, contains no such words. And the reason is obvious,—until the allotments are made, it is impossible to know what roads may be necessary. With this view, it is material to look at the 101st section. The 4th section of the 11 & 12 Vict. c. 99, also gives power to set out private roads. It enacts that "the valuer acting in the matter of any enclosure may, where he shall think fit, set out such private or occupation roads and ways through the land to be enclosed as by reason of the alteration of public roads or ways, or otherwise, he shall think requisite for the use, wholly or in part, of persons interested in other lands; and any expenses which the valuer may incur in relation to the setting out or formation or completion of such private roads, or any of them, shall, unless the valuer shall otherwise direct, be paid by such of the owners for the time being of the land the subject matter of such enclosure, and of the owners of the land for whose use the said roads shall have been set out, or of either of such classes, and in such shares and proportions, as the valuer shall direct; and, after the formation and completion of such private roads and ways, the same shall be sustained and kept in repair by and at the expense of such of the several owners in such shares and proportions and in such manner as the valuer shall direct: Provided always that the grass and herbage on such roads shall be subject to the same regulations as if they had been private or occupation roads set out under the 8 & 9 Vict. c. 118." [ERLE, C. J.—Our only doubt is, as to whether or not we should allow Mr. Grubb to declare in prohibition. WILLIAMS, J.—We are anxious to give the parties an opportunity of correcting our decision, if erroneous.]

*625] *After a short consultation, *Bovill* was stopped by the court.

ERLE, C. J.—I am of opinion that the rule to set aside the prohibition in this case should be made absolute, the commissioners, as I conceive, not having exceeded their jurisdiction. It appears that there was a proposal for the enclosure of certain lands of the manor of Hughenden, in the county of Bucks, and that in the provisional order of the commissioners it was provided that certain closes should be allotted to Mr. Grubb in fee-simple, in lieu of his right and interest in the lands to be enclosed. It further appears, that, in the subsequent proceedings under the enclosure, a private carriage-way has been set out over part of the land so allotted to Mr. Grubb: and the contention on the part of Mr. Grubb is, that the commissioners have been guilty of an excess of jurisdiction in so setting out that private way over the land so allotted to him. I am, however, of opinion that it is not inconsistent with the provisional order that that private way should be set out. Mr. Grubb takes the allotment subject to the provisions of the

Enclosure Acts; and, according to the provisions of those acts, it appears to me that the commissioners have not exceeded their jurisdiction in doing as they have done. The 8 & 9 Vict. c. 118 appears to me to have contemplated the power of setting out private ways as a right to be reserved to the commissioners, according to the requirements of the different allottees from time to time: but it has very cautiously limited those powers by providing that their exercise in respect of public ways shall not be inconsistent with the terms of the provisional order. As to private rights of way, however, the language is different, and would seem to justify an opinion that in respect of these a different provision was intended to be made. *Thus, the 34th section, to which our attention has been called, provides that, "at the meeting for appointing a valuer, or at some other meeting called by the commissioners for the purpose, the persons present by themselves or their agents at such meeting, or the majority in number and in respect of interest of such persons, may resolve upon instructions to the valuer *not inconsistent with the terms and conditions of the provisional order of the commissioners*, and of any act hereafter to be passed by which the enclosure may have been authorized, for the appropriation of parts of the land proposed to be enclosed for such public purposes as hereinafter mentioned, or any of them, that is to say" (amongst others), "for the formation of public roads and ways." Then it goes on to provide that the persons present at the meeting may also resolve "upon instructions to such valuer for the formation, alteration, or improvement on the land to be enclosed of private occupation roads and ways, &c., or any other works for the improvement of such land, or for the convenience of the occupiers of the respective allotments thereof:" but in this part of the clause the words "not inconsistent with the terms and conditions of the provisional order of the commissioners," are omitted. Again, in s. 61, where power is given to the valuer to set out and make watercourses and other works of a public nature, he is to do so "of such extent and form and in such situations as he shall deem necessary, and as shall not be inconsistent with the terms and conditions and instructions hereinbefore mentioned." So, in s. 62, which relates to the making, widening, or altering public roads and ways, it is to be done "in any manner not inconsistent with the instructions given to such valuer as aforesaid." But, when we come to the 68th section, which relates to private or occupation roads or ways, those restrictive *words are omitted; and the clause provides, in general terms, "that the valuer acting in the matter of any enclosure shall and may set out such private or occupation roads and ways through the lands to be enclosed as he shall think requisite for the use of the persons interested in such lands or any of them; and any expenses which the valuer may incur relative to the setting out or formation or completion of such private roads and ways, or any of them, shall, unless the valuer shall otherwise direct, be paid in the same manner as the other expenses of the enclosure; and such expenses of the formation and completion of such private roads and ways as the valuer shall direct shall be borne by, and after the formation and completion of such private roads and ways the same shall be maintained and kept in repair by and at the expense of, the owners and proprietors for the time being of the land enclosed, or such of them, and in such shares and proportions, and in

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such manner, as the valuer shall direct," &c. I do not, however, by any means wish to sanction the opinion, that, if the provisional order had expressly provided that no private or occupation way should be set out upon or over the land allotted to a particular individual, the commissioners could have been permitted to violate the terms of such provisional order. It is almost impossible to imagine that persons intrusted like these commissioners with the performance of a public duty would one day stipulate that an allotment should be made to a claimant free from such a burthen, and the very next day proceed to set out a private or occupation way across it. My judgment, however, proceeds on the footing that the allotment made to Mr. Grubb in fee simple was made subject to the known powers conferred upon the commissioners by the enclosure acts,—powers which must be taken to have been as well known to Mr. Grubb as to the *commissioners themselves; and which
*628] in my judgment authorize the setting out of private or occupation roads or ways over the allotted lands. It follows, therefore, that, in my opinion, the commissioners have not exceeded their jurisdiction in the particular here complained of. The law assumes that its provisions are known to all Her Majesty's subjects. One can very well conceive that Mr. Grubb understood that he was to enjoy the land allotted to him as free from interruption as if he had purchased it from an ordinary vendor: but we are bound to expound the act of parliament with reference to the rights of others as well as to those of Mr. Grubb: and, putting the best construction I am able upon the extremely wide words of these acts of parliament, I am of opinion that the commissioners had jurisdiction to do what they did.

WILLIAMS, J.—I am entirely of the same opinion. The contention on the part of Mr. Grubb is, that the provisional order vested the defined and specified allotments therein mentioned in him freed and exempted from all jurisdiction of the valuer over them except for the purpose of awarding them to him. If that were so, it seems to me that there would be an insuperable difficulty in saying that the commissioners had power under the 68th section of the 8 & 9 Vict. c. 118, to subject his allotments to the easement of a private or occupation road over it; because I am not prepared to hold that the valuer could do any act which is inconsistent with the terms and conditions of the provisional order. But I am of opinion that the construction so put upon the provisional order on the part of Mr. Grubb is not the correct one. I think the lands allotted to him were subject to be valued under the enclosure acts; and that there was nothing to prevent the valuer from dealing with those
*629] allotments in the same manner *as he would with any other of the lands embraced by the scheme. The case which was tried before me at Aylesbury in some degree bears upon this question. There, Mr. Grubb contended, as he has contended here, that the land was absolutely vested in him by the provisional order, and that the commissioners or those acting under them had no right to enter upon it for the purpose of surveying, &c. But I was of opinion then, as I am now, that the lands mentioned in the provisional order continued to be lands which were to be dealt with by the valuer of the commissioners in the discharge of their respective duties under the enclosure acts. The simple question there, as here, was, what was the meaning of the provisional order allotting the particular lands to Mr. Grubb. For some reason which does

not appear, the terms of the provisional order here are special: instead of the allotment being left to the discretion of the valuer, the lands are allotted in an unusual manner; for instance, the allotment to Mr. Disraeli is to be set out "upon the common nearest to his property at Naphill." The ordinary discretion of the valuer is thus controlled by the provisional order: but there is nothing there to show that, when this direction is complied with, the land allotted shall not be subject to the same incidents as if no such special provision had been made. Then, as to Mr. Grubb, it goes a step further: it defines the several portions which are to constitute the allotment to him. I see nothing in the terms of the order to show that the allotment when made is not to be subject to all the ordinary powers of the valuer in the discharge of his functions under the act. It is said that the setting out a private way over the allotment of Mr. Grubb is inconsistent with the terms and conditions of the provisional order, not because the quantity of the land is thereby diminished, but because of its deterioration in *value, and because possibly the valuer might subject the allotment to serious diminution by setting out several ways over it. We cannot, however, contemplate the possibility of a public officer being guilty of such an abuse of his power. I am clearly of opinion that there is no ground for a prohibition. [*630

KEATING, J.(a)—I also am of opinion that the commissioners have not exceeded their jurisdiction in this case; and I arrive at this conclusion upon the construction of the provisional order, without pronouncing any opinion as to what would be the effect of the difference in the phraseology used in the several sections of the 8 & 9 Vict. c. 118, with reference to public and to private roads. Looking at the purpose for which this provisional order is made, it is important that its terms should be strictly adhered to. It is in fact the parliamentary contract under which the enclosure is authorized. The question is, what did the commissioners mean when they made the provisional order in the terms in which it is framed, and what was Mr. Grubb justified in understanding from it when it was submitted to him for his assent? I cannot doubt that these allotments were directed to be made subject to the exercise of all the powers of the enclosure acts as to details. The same terms are used throughout with reference to all the parties interested, and they are adopted from the statute itself. It seems to me, therefore, that we should equally be violating the language of the order and the intention of the statute, if we were to hold that it exempted any of the lands ordered to be allotted from the exercise of the powers conferred on the valuer as to the settlement of the details for carrying out the enclosure. These details,—more *especially as to the setting out of private or occupation roads,—could not possibly be ascertained beforehand. The rule to set aside the writ of prohibition will therefore be made absolute. [*631

Lush submitted that it was not a case for costs.

Bovill.—This being an attempt to appeal from the decision of the commissioners, who have no personal interest in the matter, the costs should follow the result; otherwise, the burthen will be cast upon the other allottees.

ERLE, C. J.—If Mr. Grubb wishes to declare in prohibition,—which

(a) Willes, J., was engaged at the Central Criminal Court.

we give him leave to do, but not because we entertain any doubt,—he must pay the costs of this rule; if, however, he assents to our decision, there will be no costs. Rule accordingly.

*632] *WILSON v. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY. *Feb.* 11.

The plaintiff, a cap manufacturer at Cockermouth, bought cloth at Huddersfield for the purpose of making it up into caps, which he was in the habit of selling through the country by means of travellers. The cloth was delivered to the defendants on the 15th of March to be carried by their railway to Maryport; but, through the negligence of the company's servants, it was sent to Bull Gill station, and did not reach the plaintiff's hands until the 12th of April, which was too late for the plaintiff's purpose.

In an action against the company for not delivering the cloth within a reasonable time,—Held,—in accordance with the rule in Hadley v. Baxendale, 9 Exch. 341,—that the plaintiff was entitled to recover as damages the amount of the diminution in value of the cloth by reason of the season for making up and selling the caps having passed, but not the loss of anticipated profits, or the expenses of travellers despatched on journeys rendered fruitless by reason of the inability to execute their orders.

The jury having found a verdict for the plaintiff for 80*l.*, the court, upon a rule to reduce the damages to a nominal sum, proposed to make the rule absolute for a new trial unless the plaintiff would consent to a verdict for 40*l.*:—Held, that the plaintiff was still entitled to the costs of the rule, though he assented to the reduction.

THIS was an action brought by the plaintiff, a draper and cloth cap manufacturer at Cockermouth, in Cumberland, to recover damages against the Lancashire and Yorkshire Railway Company for an undue delay in the conveyance of certain cloth from Huddersfield to Cockermouth. The declaration contained two counts. The first was a special count alleging by way of special damage from the non-delivery of the goods in time, that the plaintiff had thereby been unable to sell or use any part of the cloth, or to manufacture the same or any part thereof into caps in time for the season. The second was for non-delivery within a reasonable time. The defendants pleaded not guilty.

The cause was tried before Wilde, B., at the last Summer Assizes at Liverpool. The facts were as follows:—The plaintiff had purchased cloth at Huddersfield of the value of 230*l.*, which he on the 15th of March, 1860, caused to be delivered to the agent of the defendants at that place for the purpose of being carried by their railway to Maryport, whence they were to be fetched by the plaintiff's cart. By some misapprehension as to their instructions, the agents of the company, instead of forwarding the trusses to Maryport, sent them to Bull Gill, which *633] was nearer to *Cockermouth; and the result was, that the goods did not reach the plaintiff until the 12th of April, whereas he ought to have received them on the 19th of March. The result was that he did not receive the cloth in time to manufacture it into caps, the season having passed before he could execute the orders obtained by his travellers. And, according to his evidence, which stood without contradiction, the cloth thereby became of less value to him by 100*l.* He also claimed by way of damages the loss of the season, that is, the loss of the profit he would have made by the sale of caps that season if the cloth (which could not be procured in Cockermouth) had arrived in due time.

On the part of the defendants, it was submitted that the "loss of the season" was not a legitimate ground of damage, and that the plaintiff could in no event be to more than nominal damages for the delay entitled in forwarding the cloth.

The jury returned a verdict for the plaintiff for 80*l.*; and the learned Baron reserved leave to the defendants to move to reduce the damages if the loss of the season was not properly the subject of damages,—the court to fix the amount of damages or to direct how they should be ascertained, if they should be of opinion that the case was one for more than nominal damages.(*a*)

Edward James, Q. C., accordingly, in Michaelmas Term last, obtained a rule nisi to reduce the damages to a nominal sum, "on the ground that the jury were not entitled to give the plaintiff the loss of his profits for the season." He submitted that the case did not fall within the rule laid down by the Court of *Exchequer in Hadley *v.* Baxendale, 9 Exch. 341.† [BYLES, J.—The rule in Hadley *v.* Baxendale is not a new one. It is to be found so laid down in 1 Pothier on Contracts, p. 92.] A new trial was also moved for on the ground that the verdict was against evidence: but, the learned Baron reporting that he was not dissatisfied with the result, the court declined to grant a rule upon that ground. [*634

S. Temple, Q. C., and *T. Jones*, showed cause.—In estimating the damages which the plaintiff was entitled to for the delay in the delivery of the cloth, the jury were well warranted in taking into consideration the deterioration in the market value of the cloth by reason of the lapse of the season for making it up into caps in the way of the plaintiff's trade. It appeared that the plaintiff was a cap-manufacturer at Cockermouth, who was in the habit of buying cloth at Huddersfield for the purpose of his trade, sending out travellers through the country to collect orders; and that, by reason of the delay in the delivery of the cloth in question by the defendants, and his inability to obtain a supply in time elsewhere, the season for the sale of the article was lost, and the expenses incurred by his travellers unavailing. The case falls clearly within the first branch of the rule laid down by the Court of Exchequer in Hadley *v.* Baxendale, 9 Exch. 341, 354,†—"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as *the probable result of the breach of it." Here is a manufacturer ordering goods for the purpose of his trade from the district where it is well known that the article is made: it follows as a natural and necessary consequence that unreasonable delay will cause him to lose the market or season for the sale of his goods. There is no substantial difference between loss of market and deterioration in the market value of the goods in consequence of their non-arrival in time to be made up into caps. The plaintiff proved that the difference in value was 100*l.*; and there was no evidence the other way. The case was [*635

(*a*) Williams, J., observed upon the motion that no leave could properly be reserved to reduce the damages, unless to a specific sum.

properly left to the jury; and there is no pretence for saying that the plaintiff was only entitled to nominal damages, or that the sum the jury have given was excessive. [WILLES, J.—It is usual for all trades to have a season.] Each season brings its new fashions, and therefore the loss of a season is the loss of a certain profit. [WILLIAMS, J.—Before the case of Hadley v. Baxendale, the jury would have been told to consider what deterioration in value the goods had sustained in consequence of their not having arrived in due time.] That is substantially the way it was left to them. Hadley v. Baxendale was confirmed and adopted by the Court of Queen's Bench in Smeed v. Foord, 28 Law J., Q. B. 179. There, the defendant contracted to deliver to the plaintiff, a farmer, a steam thrashing-machine within three weeks from the 24th of July, but did not do so until the 11th of September. The plaintiff, as the defendant well knew, was in the habit of thrashing out his wheat in the field, and sending it off at once to the market. In consequence of the non-delivery of the machine, it became necessary to carry the wheat home and stack it. The wheat was damaged by exposure to the weather, so that it was necessary to dry it in a kiln, and the quality was much
*636] deteriorated, *and before it could be sold the market price had fallen. The defendant knew that the machine was wanted for immediate use at the time appointed for the delivery, but he led the plaintiff on from day to day to believe that it would be shortly delivered. In an action for the non-delivery of the machine, it was held, in accordance with the rule laid down in Hadley v. Baxendale, that the plaintiff was entitled to recover damages in respect of the deterioration of the quality of the wheat, in respect of the expense of carrying and stacking it, and in respect of the expense of kiln-drying it, but not to damages in respect of the fall in the market. "The rule," said Lord Campbell, "is to be taken from the case of Hadley v. Baxendale, which accords with the Code Napoleon,(a) with Pothier,(b) and with Chancellor Kent,(c) and which decides that the plaintiff is entitled to receive as a compensation such damages as are the natural consequences of the breach of the contract, or such as may reasonably be supposed to have been in the contemplation of the parties. * * * If the engine had been delivered at the time agreed upon, the corn would have been thrashed out, and would have been carried to market in good condition, instead of which it was damaged. Is not this injury a natural consequence of the breach of contract? and may it not reasonably be supposed to have been foreseen by the parties?"(d) Hadley v. Baxendale was also recognised in Fletcher v. Tayleur, 17 C. B. 21, where Jervis, C. J., in the
*637] course of the argument, suggests that "it would be *extremely convenient if there were some general rule as to the measure of damages applicable to all cases of breach of contract, rather than that the matter should be left at large. May it not be that the breach of a mercantile contract may be susceptible of estimation according to the average percentage of mercantile profits? Is not that to some extent

(a) Cited Sedgwick on Damages, 2d edit., p. 6, referring to Domat: Loix Civiles, Lec. III., Tit. 5, Sec. II., § 2.

(b) 1 Pothier on Contracts, p. 92.

(c) 2 Kent's Comm., 8th edit. 625 n.

(d) And see Bramley, app., Chesterton, resp., 2 C. B. N. S. 592 (E. C. L. R. vol. 89); Portman v. Middleton, 4 C. B. N. S. 322 (E. C. L. R. vol. 93).

the result of Hadley *v* Baxendale?" Willes, J., says: "It might be a convenient rule, if, as suggested by my Lord, the measure of damages in such a case as this was held by analogy to be the average profit made by the use of such a chattel." [WILLES, J.—Fletcher *v.* Tayleur is no authority upon this subject: it was a mere suggestion. BYLES, J.—Suppose the goods were never delivered at all; would the proper measure of damages be the value at the time of the delivery of the goods to the carrier, or their value at the time and place where they ought to have been delivered?] Their value at the time and place where the goods ought to have been delivered. The rule in Hadley *v.* Baxendale was also recognised in Le Peintur *v.* The South Eastern Railway Company, 2 Law Times (N. S.) 170, and Dingle *v.* Hare, 7 C. B. N. S. 145 (E. C. L. R. vol. 97). The plaintiff is clearly entitled to recover compensation for the substantial injury which he has sustained: and, if so, who but the jury are the proper persons to estimate it? No loss of anticipated profits appears to have been taken into consideration. [BYLES, J.—I must confess I do not see upon what principle we are to say that the jury have awarded a wrong measure of damages in this case.]

Edward James, Q. C., in support of his rule.—Loss of profit cannot, consistently with the rule laid in Hadley *v.* Baxendale, 9 Exch. 341,† be taken into consideration in estimating the damages in a case of this sort. The jury were not warranted, therefore, in giving *the plaintiff anything for the loss of market. [WILLIAMS, J.—The plaintiff was not entitled to anything for loss of profits: but he was entitled to recover as damages the difference between the original value of the cloth, and the diminished value occasioned by the loss of the season which resulted to him from the unreasonable delay in the delivery of it. BYLES, J.—I believe we are all of opinion that the plaintiff was not entitled to anything for loss of profits: but it must not be assumed that loss of profits and diminution of value mean the same thing.] The loss of a market cannot according to Hadley *v.* Baxendale form a ground of damage. In Smeed *v.* Foord, 28 Law J., Q. B. 178, one ground of damage was the loss of market. And Crompton, J., says: "I think we must not extend Hadley *v.* Baxendale any further than it has been carried at present. The present case is one where the contract was for a particular article wanted for a particular purpose; and there may be a great difference between a case in which a person delivers an article to a carrier to be conveyed by him, and a case where there is a contract between two parties both of whom know what the state of things is at the time the contract is made. We are bound by the decision as far as it goes; and it is clear law as respects the proximate natural damages arising from the breach of contract; and we cannot complain of the other branch of the rule, that the damages should be such as may reasonably be supposed to have been in the contemplation of both parties, because that only means that they should be such as are natural, and such as the parties would naturally look for. I should tell the jury that they ought to give the plaintiff such damages as were the natural consequences of the breach of contract, but it is doubtful whether anything more than the general rule ought to be laid down." And Hill, J., adds: "In Hadley *v.* *Baxendale, Lord Wensleydale called attention (23 Law J., Exch. 181) to the distinction which has [*639

[*638

been adverted to by my Brother Crompton. He said: "In a contract to build a mill, the builder knows that a delay on his part will result in a loss of business; but a carrier contracting to carry a shaft or wheel does not estimate in his mind the consequential damages by the loss of trade arising from the loss or damage of the article." Le Peintur v. The South-Eastern Railway Company, 2 Law Times (N. S.) 170, is a strong authority for the defendants upon the subject of loss of profits. It was there held, that, where goods are delayed in the carriage, the carriers are not responsible for loss of wages of workmen kept unemployed by reason of the delay in the arrival of the goods, or the loss of profit by reason of such goods not being worked up and sold in the course of trade,—the court saying that they could not grant a rule without overruling the decision in Hadley v. Baxendale. [WILLIAMS, J.—What principle is to guide us in estimating the damages the plaintiff has sustained? KEATING, J.—There was no evidence in Le Peintur v. The South-Eastern Railway Company that the skins were not fully as valuable as they would have been if they had arrived fourteen days earlier.] The onus of showing the principle upon which the damage is to be estimated lay on the plaintiff, and he has left it in doubt. In Hamlin v. The Great Northern Railway Company, 1 Hurlst. & N. 409,† which was an action for delaying a passenger on a railway journey, there being no train to take the plaintiff on as stated in the time-bill published by the company, Pollock, C. B., says: "In actions for breaches of contract, the damages must be such as are capable of being appreciated or estimated. Mr. Wilde was invited at the trial to state what were the damages to which the plaintiff was entitled. He said, general damages. *640] The *plaintiff is entitled to nominal damages at all events, and such other damages of a pecuniary kind as he may have really sustained as a direct consequence of the breach of contract. Each case of this description must be decided with reference to the circumstances peculiar to it: but it may be laid down as a rule that generally in actions upon contracts no damages can be given which cannot be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach of contract.(a)

Gray, Amicus Curiæ, referred to a case of Gee v. The Lancashire and Yorkshire Railway Company, since reported 6 Hurlst. & N. 211.† There, the plaintiffs delivered to the defendants, who were carriers, ten tons of cotton, to be carried from Liverpool to Oldham. In the usual course the cotton should have been received on the following day, but it did not in fact arrive till four days afterwards. In consequence of the delay, a new mill of the plaintiffs was stopped for want of cotton to go on with. At the time of the delivery of the cotton to the defendants nothing was said as to the particular inconvenience likely to result from the delay in forwarding it: but, on the day before it was delivered to the defendants, and repeatedly on each succeeding day until it arrived at Oldham, one of the plaintiffs called to inquire about it, and on each occasion told the manager of the goods department at the Oldham station that the mill was at a stand solely on account of the non-delivery of the cotton. In an action against the defendants for neglect in

(a) See Sedgwick on Damages, 2d edit. 71, 72, citing Freeman v. Shute, 3 Barb. S. C. R. 424.

*delivering the cotton, the plaintiffs proved that during the time the mill was at a stand they had paid in wages 7*l.*, and that the profit which would have been made if the mill had been at work was 7*l.* 10*s.* The judge of the county court told the jury that when, as in the present case, by the neglect of a carrier, a man had no material to carry on his business, he had a right to charge as legal damage such loss as naturally and immediately arose from stopping the mill; that the plaintiffs were entitled to the money they had actually paid as wages, 7*l.*, and that the profit which the plaintiffs would have made was a fair subject of calculation, and the jury should therefore give, over and above the 7*l.*, such amount as would be the actual loss and detriment the plaintiffs had suffered by the non-arrival of the cotton in due course. Upon an appeal against this ruling, the Court of Exchequer held that the judge had misdirected the jury, and that the plaintiffs were not entitled to the amount of wages paid and of the profits lost, as *legal damage*, inasmuch as it assumed that the stoppage of the mill arose entirely from the non-delivery of the cotton, when in fact it arose partly from that and partly from the plaintiffs having no cotton to go on with. [*641

WILLIAMS, J.—As I collect from the report of the learned judge in this case, the jury appealed to him for information as to how they were to assess the damages, and were informed by him that they were at liberty to take into consideration the fact that the plaintiff had lost the season in consequence of the non-arrival of the cloth in due time. Acting upon that information, the jury found a verdict for the plaintiff with 80*l.* damages. Now, if by the expression "loss of the season," the jury were induced in assessing the damages to take into their consideration the profits which the *plaintiff might have made by the manufacture and sale of caps if the material had reached his hands in due time, we are all of opinion that they would have misconceived the proper principle on which the damages were to be estimated, and that there would be a failure of justice if the verdict were allowed to stand. But, if we are to assume the meaning of "loss of the season" to be that the goods by reason of their not having been delivered in due time had become lessened in value, that is, if in consequence of the delay they had become of less value to the plaintiff, because the articles to be made up would be less marketable as the time for finding customers for them had gone by, and so the goods were left in the plaintiff's hands deteriorated or diminished in value, then we do not think there was any mistake in point of law in the direction of the learned judge. Two questions of law were raised during the argument on the part of the defendants. The first was, whether in a case like this, of an action against a common carrier for negligence in not delivering goods intrusted to him within a reasonable time, the consignee has a right to claim in the shape of damages the profit he would have made upon the sale of them if they had been delivered in proper time. We are all of opinion that he is not. Then comes the other question, whether he is entitled to recover the difference between the value of the goods to him if they had been delivered in proper time, and their value at the time when they were actually delivered. I am of opinion that the consignee is entitled to recover such difference in value. If it were otherwise, great injustice would be done; for instance,—to put a familiar case,—suppose a tradesman at a fashionable watering place sends an order to a ware- [*642

houseman in London for a quantity of ribbons or other fancy goods, and
*643] they are delivered to a *carrier so that they ought to reach him at the beginning of the season, and through the negligence of the carrier their delivery is delayed until the season is over, so that the opportunity for offering them for sale is lost, and, as their novelty or fashion are gone, they remain on hand materially diminished in value, would it not be unjust if the carrier were not made liable in damages for the loss which thus resulted from his negligence? Applying that to the present case, it appears from the plaintiff's evidence, that, if the cloth in question had been delivered in due course, so as to enable him to make it up into caps for the season, its value to him would have been about 230*l.*; but that, by reason of the time which had been suffered to elapse before the cloth was delivered, it was worth only 130*l.* That evidence was left to the jury, and they must have taken it into their consideration. It was evidence for the jury that the defendants, by reason of their negligence, delivered the cloth to the plaintiff at a time when its value was less by 100*l.* than it would have been if they had been guilty of no negligence. But it is contended on the part of the defendants, that, whatever may be the dictates of justice in the matter, such damages cannot be awarded to the plaintiff without violating the rule laid down by the Court of Exchequer in Hadley *v.* Baxendale, 9 Exch. 341.† It seems to me, however, that we shall not violate that rule if we hold that the plaintiff is entitled to recover damages in respect of such deterioration in value. It is a damage which fairly and naturally in the usual course of things may be said to arise from the defendants' negligence; for, if the goods are not delivered at the time they are expected, the delay must necessarily superinduce a considerable diminution in their value in the plaintiff's hands. Looking, how-
*644] ever, at the evidence of the plaintiff, and *at the amount of damages awarded by the jury, which certainly is very considerable, looking also at the ambiguity of the expression "loss of the season," which may mean either loss of profits of the season or loss by depreciation in market value, one cannot but conceive it to be possible that the jury may have been under some misapprehension; and therefore I am inclined to think that justice will be best administered in this particular case by our making the rule absolute for a new trial unless the plaintiff will consent to the verdict being reduced to 40*l.*

WILLES, J.—I am of the same opinion. It appears to me that the damage in respect of the goods being depreciated in value in consequence of their arrival at a time when they were less in demand and less capable of being applied usefully by the plaintiff, is the ordinary, natural, and immediate consequence of the delay, for which the carrier is answerable. I think it may be put as matter of ordinary experience, that, amongst the causes of the fluctuations in price to which merchandise is subject, is the fact that certain goods are more in demand at one time than at another, in consequence of their being more capable of being disposed of upon advantageous terms. It appears to me that that is matter of ordinary experience and knowledge, and that a loss thus arising may well be said to be the direct and immediate consequence of an unreasonable delay in the carriage and delivery of goods. If, therefore, the damages were assessed by the jury in this case with a view to the diminished value of the cloth from that cause, it seems to me that

they were properly assessed. But, for the reasons stated by my Brother Williams, it may, I think, be doubted whether the jury may not have taken into consideration the loss of profits which the plaintiff might have *acquired by the making up and sale of the caps. That clearly would not be properly admissible as a ground of damage: [*645 it would be inadmissible by reason of remoteness; and I do not think that any amount of notice would suffice to fix the defendants with that. The court, however, has power by the terms of the reservation to deal equitably with the amount; and I think that the sum proposed by my Brother Williams will be the best result, and will meet the justice of the case.

BYLES, J.—I am of the same opinion. Whatever weight may be given to the suggestion, that, in laying down rules for the assessment of damages for the breach of a contract, unnecessary difficulties and refinements have been introduced, the case of Hadley *v.* Baxendale, 9 Exch. 341,† has, I apprehend, definitively laid down the rule, and upon that principle we must decide the present case. It is there said, that, "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." I agree with Mr. *James*, that, as the defendants here knew nothing about the nature of the goods or of the plaintiff's occupation, profits which might have accrued from making up the cloth into caps and selling them, clearly were not within the contemplation of both parties at the time they made the contract, as the probable result of the breach of it; and therefore loss of profits could not properly enter into *the consideration of the jury in assessing the damages here. The difficulty, however, is, to distinguish between loss of profits [*646 and the difference between the exchangeable value of the goods when received by the carriers, or rather when they ought to have been delivered by them, and when they were actually delivered. Profits include the increased value arising from the purpose to which the plaintiff intended to apply the goods: whereas, diminution in exchangeable value is only something subtracted from the inherent value of the articles themselves. When thoroughly considered, this, I think, will be found to be a sound distinction. It is admitted that deterioration in quality is to be taken into account in estimating the damage the plaintiff has sustained; it is admitted also that loss or diminution in the quantity is to be taken into account: and I do not see why a loss in the exchangeable value of the goods should not also be taken into account. For these reasons, I am of opinion that the plaintiff was entitled to substantial damages in this case: but I cannot help thinking with the rest of the court that it is highly probable that the jury may have taken into the account the loss of prospective profits. We must therefore do the best we can; and, under the circumstances, it seems to me that justice will be done to both parties if the verdict is allowed to stand for 40*l.*

KEATING, J.—I entirely agree in the conclusion at which the rest of the court have arrived. There is undoubtedly some difficulty in apply-

ing the rule in Hadley *v.* Baxendale to each particular case. It is agreed that the plaintiff cannot recover any damages for loss of profits. But it was contended by Mr. *James* that the jury could not give more than nominal damages without giving profits. I must confess I at first
*647] felt some difficulty in excluding the loss of profits from the *calculation, when considering the deterioration in value. But that difficulty has been removed by what has fallen from the other members of the court: and I agree with them, that, in estimating the damages the plaintiff has sustained from the delay in delivering the goods, the jury were justified and indeed bound to take into their consideration the difference between their exchangeable value at the time they arrived and their value at the time they ought to have arrived. In truth, to come to the conclusion to which Mr. *James's* argument would lead us, viz., that the plaintiff was only entitled to nominal damages, would be applying the rule in Hadley *v.* Baxendale to establish an absurdity. It would in effect come to this, that a carrier would be liable for the consequences of his negligence where the result was a deterioration in the quality or quantity of the article, and yet would be liable only to nominal damages for any other description of injury. It seems to me that the rule in Hadley *v.* Baxendale never was intended to lead to any such practical absurdity and injustice; and that, according to that rule, the true measure of damages in a case like the present, is, the difference in the exchangeable value of the article.

The plaintiff consenting to the terms proposed, Rule discharged.

James submitted, that, inasmuch as the rule was virtually made absolute, there should be no costs.

PER CURIAM.—You moved to reduce the verdict to nominal damages, and you have failed. The plaintiff must have the costs of the rule.

Rule accordingly.

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*648] *In the Matter of THE HAINAULT FOREST ACT, 1858.
Jan. 21.

The forest of Hainault, at the time of the passing of the disafforesting act, 14 & 15 Vict. c. 43, comprised certain open commonable lands, called the King's Forest or King's Woods, in the parishes of Barking and Dagenham (within the manor of Barking), containing 2842 acres, and another tract of waste in the parishes of Chigwell, Lambourne, and Stapleford Abbotts, consisting of 1104 acres, and also a piece of woodland called Tom's Wood Hill containing about 44 acres. The rest of the forest consisted of enclosed land in the several parishes of Barking, Dagenham, Chigwell, Lambourne, and Stapleford Abbotts.

By the 21 & 22 Vict. c. 37, "an act to provide for the allotment of the commonable lands within the boundaries of the late forest of Hainault,"—after reciting, amongst other things, that there were within the boundaries of the late forest of Hainault, in addition to the commonable lands within that part of the said forest which is situate within the parishes of Barking and Dagenham, and usually known as the King's Forest or King's Woods, divers other commonable lands situate in various other parishes, and that doubts existed whether the Crown and the persons possessing rights of common within the boundaries of the said late forest were entitled to exercise them over all commonable lands within the boundaries of such forest, or only over such of the said commonable lands as lay in the same parish or district as the lands in respect of which such rights were claimed, and that it was expedient that provision should be made for setting out a part of the unallotted portion of the King's Forest or King's Woods, containing 969*a.* 3*r.* 17*p.*, to the Crown and other the persons entitled to common of estovers or fuel assignments, and for dividing and allotting such part between them in satisfaction of their said rights, and that it was also expedient to ascertain and define the commonable lands within the boundaries of the said late forest,—it was by s. 6 enacted that the commissioner

appointed to carry the act into execution "should cause a plan to be made showing what commonable lands were then situate within the boundaries of the King's Forest or King's Woods, as such several boundaries were respectively defined by the award of the commissioners mentioned in the said act (14 & 15 Vict. c. 43) and the plan therein referred to, and that the plan so to be made should also show the said unallotted lands containing 969*a.* 3*r.* 17*p.* in the King's Forest or King's Woods, and what portions thereof had been allotted to the said fuel rights, &c.; and further, that the said commissioner should ascertain and determine by his award thereby directed to be made, whether the rights of common, or any of them, other than the said fuel rights, in the said late forest of Hainault, *extend indiscriminately over all the said commonable lands which he might find to be situate within the boundaries of the said late forest, including the unallotted portion of the King's Forest or King's Woods, or whether such rights, or any of them, are limited to the commons in the particular parish, district, or place in which are situate the lands in respect of which the rights are claimed, or what is the nature of such rights;* and that, in case the said commissioner should find that the rights of common, or any of them, are exerciseable generally over all the commonable lands within the said late forest, or over any other commonable lands than those in the parish, district, or place in respect of which the rights exist, or if the commissioner should find that the inhabitants of the parish in which the commonable lands in the King's Forest or King's Woods are situate are alone entitled to rights of common over such lands, then the said commissioner should by his award set out a specific portion of the said commonable lands in any part of the said late forest of Hainault to each parish, district, or place in which the inhabitants have rights of common, as and for a common for such parish, district, or place, and thenceforth the right of such parish, district, or place, or of the persons therein entitled to any such rights of common, should, as regards such rights of common, be confined to such specific portion so set out and apportioned as aforesaid, and in lieu of the general or other right of common over the whole or any part of the unenclosed lands aforesaid; and that all rights of intercommonage should upon the execution of the commissioner's award cease and determine, and such allotments of specific rights of common in respect of each such parish, district, or place should be made with reference to the whole amount of commonable land and the extent of the rights of the commoners in respect of each such parish, district, or place for which an allotment should be so made as aforesaid; and that his decision in the premises should be final and binding on all parties,"—subject to a case to be stated for the opinion of the Court of Common Pleas. And it was further provided that "all encroachments made since the award of the commissioners under the 14 & 15 Vict. c. 43 on any part of the said 969*a.* 3*r.* 17*p.* within the boundaries of the King's Forest or King's Woods should be deemed to be part of the lands to be allotted under the provisions of the said act."

The evidence as to the rights of common of the commoners of the five parishes of Barking, Dagenham, Chigwell, Lambourne, and Stapleford Abbotts, consisted of acts of user for more than sixty years previously to and down to the time of the disafforestation, and was to this effect,—that a reeve was appointed for each of the five parishes, whose duty it was to mark the cattle of the persons entitled to common in their respective parishes; that the marking usually took place near the boundary of the King's Forest or King's Woods, and within the parish to which the cattle so marked belonged; that the cattle were generally turned out at the spot where they were marked, *and then went where they pleased,*—those turned on to the King's Forest or King's Woods straying all over the other commonable land in the forest in the parishes of Chigwell, Lambourne, and Stapleford Abbotts, and those turned on to the commonable lands in the last-mentioned parishes straying over the King's Forest or King's Woods.

The commissioner by his award found that "the rights of common which are exerciseable in respect of those parts or districts of the several parishes of Barking, Dagenham, Stapleford Abbotts, Lambourne, and Chigwell, which lie within the boundaries of the said forest, as ascertained as aforesaid, are exercised exclusively over the commons or commonable land hereinbefore mentioned situate within such last-mentioned parishes, including the King's Forest or King's Woods; and that the last-mentioned rights of common, or any of them, are not limited to the commons in the particular parish, district, or place, in which are situate the lands in respect of which the said rights are claimed; but that the said rights claimed for each of the last-mentioned parishes, districts, or places, extend indiscriminately and generally over all the said commons or commonable land in each and every of the same parishes, districts, or places, including the King's Forest or King's Woods:"—

Held, upon a case stated for the opinion of the court,—that the decision of the commissioner was warranted by the evidence, and the matter within his jurisdiction.

As to Tom's Wood Hill,—which consisted principally of bushes and fern, with some small pieces of open pasture,—the evidence of user was similar to that relating to the rest of the unenclosed lands: but it appeared in addition, that, in 1827, fifteen acres of it (not now in question) had been enclosed by a former owner without interruption, and that, in 1856, other

eight acres of it had been exchanged by the present owner for other land belonging to the commissioners of woods and forests, and that the residue was then enclosed together with the land acquired by the exchange :—

Held, that there was nothing in the evidence to take Tom's Wood Hill out of the general decision of the commissioner.

THE following case was stated for the opinion of this court:—

By an act of parliament (14 & 15 Vict. c. 43), intituled "An act for disafforesting the forest of Hainault, *in the county of Essex,"— *649] after reciting that the Queen's most excellent Majesty, in right of her Crown, was or claimed to be seised, to herself, her heirs and successors, of and in Waltham Forest, formerly called The Forest of Essex, one portion of which was usually called or known by the name of Hainault Forest; and that Her Majesty, in right of her Crown, was or claimed to be seised, to herself, her heirs and successors, of the soil of that portion of the said parish of *Hainault, which was com- *650] monly called The King's Forest or King's Woods, and of the timber and other trees, bushes, and underwood standing and growing thereon; and that the said forest of Hainault was subject to divers claims of rights of commons and other rights and interests of her Majesty and of divers of her Majesty's subjects in and over the same; and reciting further that her Majesty had been graciously pleased to signify her consent that the said forest should be disafforested, and that an allotment should be made to her Majesty in respect of her forestal estate, rights, and interests in and over the said forest of Hainault,—it was enacted, amongst other things, that the provisions of the said act should be carried into execution by commissioners to be appointed as therein mentioned, and that the commissioners of the said act should proceed to ascertain the boundaries of the said forest of Hainault, and also of that portion of the forest called The King's Forest or King's Woods, and that the said boundaries as ascertained by the said commissioners should be held to be true boundaries of the said forest and of the said King's Forest or King's Woods, for all the purposes of the said act, as between her Majesty and all persons whose estates or rights therein were to be or should be in any wise dealt with or affected under the provisions of the said act, but not further or otherwise; and that the said commissioners, as soon as they should have ascertained the aforesaid boundaries, should proceed to set out and allot to her Majesty such part or parts of the said King's Forest or King's Woods as they should think a sufficient compensation to her Majesty for all her forestal rights in and over the said forest of Hainault, for her rights of soil in the said King's Forest or King's Woods and in other the unenclosed portions of the said forest of Hainault (if any), for her rights of timber and other *trees, bushes, and underwoods in the said woods *651] or elsewhere in the said forest; and that such allotment or allotments, when made, should be vested in her Majesty, her heirs and successors, freed and discharged from all rights or claims of commons of pasture, estovers, or assignments of fuel, wood, and other rights or claims whatsoever; and that, on the making of such award, the said forest of Hainault should be for ever disafforested, and the residue of the said King's Forest or King's Woods, and all other parts of the said forest of Hainault (not then enclosed), should become the property of the Queen's Majesty and the several persons entitled to rights of com-

mon in and over the said forest, or any part thereof, as they were then entitled to the same, freed and discharged from all rights of soil, rights of timber, and all forestal rights of her Majesty, her heirs and successors.

And,—after reciting that Sir Charles Hulse, Baronet, made claim, as lord of the manor of Barking, to the soil of that portion of the said forest of Hainault which was called the King's Forest or King's Woods, or some part thereof, and claimed title to the same through and under certain grants thereof made to the ancestors of the said Sir Charles Hulse by her Majesty's royal predecessor King Charles the First,—it was enacted that it should be lawful for the commissioners of her Majesty's woods to compromise the said claim: And it was also enacted that nothing in the said act contained should in any wise extend to or prejudice the title, right, or claim of her Majesty to any right of common appendant or appurtenant to any anciently enclosed land of her Majesty, or the title, right, or claim of her Majesty, or any person or persons, to certain enclosed parts of the said forest therein mentioned.

The commissioners appointed by the said act made *their award dated the 6th of November, 1852, and thereby ascertained [*652 for the purposes of the said act the boundaries of the forest of Hainault, and also of the portion of the forest called the King's Forest or King's Woods.

The forest of Hainault, as ascertained by the commissioners, for the purposes of the said act, comprised certain open commonable lands and certain enclosed lands. The open commonable lands consisted of,—first, the King's Forest or King's Woods, situate partly in the parish of Barking and partly in the parish of Dagenham, and contained together 2842 acres. The whole of this land is within the ambit of the manor of Barking, and was up to the time of the disafforestation open and unenclosed,—secondly, another tract in the parishes of Chigwell, Lambourne, and Stapleford Abbotts, stretching along the northern side of the King's Forest or King's Woods, and containing about 1104 acres. This latter tract consists of open and unenclosed land within the ambit of the several manors of Chigwell, Westhatch, Woolston Hall, Barringtons, Lambourne, and Battle Hall, and lies open to the King's Forest or King's Woods, without any visible line of separation. From time to time small parcels of this land have been granted out by the lords of the several manors, or some of them, with the consent of their respective homages.

The forest also comprised certain detached portions of commonable manorial waste in the parishes of Navestock and Woodford, the rights over which are not controverted in the present case: and it comprised also a certain piece of woodland called Tom's Wood Hill, which is subject to the question hereinafter stated, whether such piece of woodland is or is not commonable.

The remainder of the forest, as so ascertained by *the commissioners, consisted of enclosed land of the following parishes, [*653 namely,—

Part of the parish of Barking	about	4871 acres.
" Dagenham	"	716 "
Chigwell	"	3307 "
The whole of the parish of Lambourne	"	2163 "
Part of the parish of Stapleford Abbotts	"	1383 "

And also small portions of the parishes of Navestock and Woodford which need not be further noticed. The remainder of the parish of Chigwell lies within the forest of Epping.

There is no evidence to show that the boundary line of the forest where it passes through any of the above-mentioned parishes is conterminous with the boundary line of any tithing, hamlet, or other district of or within any of the parishes, or, so far as can be ascertained, within the boundaries of any of the above-mentioned manors.

The commissioners of the said act made certain allotments, containing in the whole about 1873 acres, from the King's Forest or King's Woods, as a compensation to her Majesty for all her Majesty's forestal rights in and over the said forest of Hainault, for her rights of soil in the said King's Forest or King's Woods and in other the unenclosed portions of the said forest, and for her rights of timber and other trees, bushes, and underwoods in the said woods or elsewhere in the said forest; and also made certain other allotments directed by the said act.

By an act of parliament (21 & 22 Vict. c. 37), intituled "An Act to provide for the allotment of the commonable lands within the boundaries of the late forest of Hainault, in the county of Essex,"—after reciting the last-mentioned act (14 & 15 Vict. c. 43), and the award of the said commissioners in pursuance thereof; and reciting further the claim of
*654] her Majesty *and of other parties to certain rights of common of estovers or of cutting wood for fuel, commonly called fuel assignments, in the late forest of Hainault; and reciting also that there were then within the boundary of the late forest of Hainault, in addition to the commonable lands within that part of the said forest which is situate within the parishes of Barking and Dagenham, and usually known as the King's Forest or King's Woods, divers other commonable lands situate in various other parishes, and that doubts existed whether the Queen's Majesty and the persons possessing rights of common within the boundaries of the said late forest were entitled to exercise them over all commonable lands within the boundaries of such forest, or only over such of the said commonable lands as lie in the same parish or district as the lands in respect of which such rights were claimed, and that it was expedient that provision should be made for setting out a part of the unallotted portion of the King's Forest or King's Woods, containing 969*a.* 3*r.* 17*p.*, to the Queen's Majesty and other the persons entitled to common of estovers or fuel assignments, and for dividing and allotting such part between them in satisfaction of their said rights, and that it was also expedient to ascertain and define the commonable lands within the boundaries of the said late forest,—it was enacted that the provisions of the now stating act should be carried into execution by a commissioner to be appointed as therein mentioned; and that the commissioner so to be appointed should ascertain the persons, including her Majesty, entitled to such common of estovers or fuel assignments, and should allot to the owners of such estovers such part of the unallotted portion of the King's Forest or King's Woods as he should consider an equivalent for the same.

*655] And it was by the 6th section of the said act further *enacted, that the said commissioner should cause a plan or plans to be made showing what commonable lands there were then situate within the boundaries of the King's Forest or King's Woods, as such several

boundaries were respectively defined by the award of the (disafforesting) commissioners mentioned in the said act and the plan therein referred to, and that the plan so to be made should also show the said unallotted lands containing 969*a.* 3*r.* 17*p.* in the King's Forest or King's Woods, and what portions thereof had been allotted to the said fuel rights and had been sold under the power by the said act given; and, further, that the said commissioner should ascertain and determine by his award thereby directed to be made, whether the rights of common, or any of them, other than the said fuel rights, in the said late forest of Hainault, extend indiscriminately over all the said commonable lands which he might find to be situate within the boundaries of the said late forest, including the unallotted portion of the King's Forest or King's Woods, or whether such rights, or any of them, are limited to the commons in the particular parish, district, or place in which are situate the lands in respect of which the rights are claimed, or what is the nature of such rights; and that, in case the said commissioner should find that the rights of common, or any of them, are exerciseable generally over all the commonable lands within the said late forest, or over any other commonable lands than those in the parish, district, or place in respect of which the rights exist, or if the commissioner should find that inhabitants of the parishes in which the commonable lands in the King's Forest or King's Woods are situate are alone entitled to rights of common over such lands, then the said commissioner should by his award set out a specific portion of the said commonable lands in any part of *the said late forest of Hainault to each parish, district, or place in [*656 which the inhabitants have rights of common, as and for a common for such parish, district, or place, and thenceforth the right of such parish, district, or place, or of the persons therein entitled to any such rights of common, should, as regards such rights of common, be confined to such specific portion so set out and apportioned as aforesaid, and in lieu of the general or other right of common over the whole or any part of the unenclosed lands aforesaid; and that all rights of intercommonage should upon the execution of the commissioner's award cease and determine, and such allotments of specific rights of common in respect of each such parish, district, or place should be made with reference to the whole amount of commonable land and the extent of the rights of the commoners in respect of each such parish, district, or place for which an allotment should be so made as aforesaid; and that his decision in the premises should be final and binding on all parties: And it was by the said 6th section declared that all encroachments made since the award of the commissioners under the recited act (14 & 15 Vict. c. 43) on any part of the said 969*a.* 3*r.* 17*p.* within the boundaries of the King's Forest or King's Woods, should be deemed to be part of the lands to be allotted under the provisions of the said act: Provided (s. 7) that, in case any person should be dissatisfied with any decision of the commissioner in reference to the nature of any of the rights of common which he is by the last-mentioned section of the said act directed to ascertain and determine, or as to the lands over which such rights extend or are exerciseable, or to which they are limited, the commissioner should, on the application of the persons so dissatisfied, prepare a case to be submitted to her Majesty's Court of Common Pleas, to be argued before and

*657] decided on *by the said court; and that the judgment and determination of such court should be taken as the judgment of the commissioner: Provided that no such application should be received by the commissioner unless the same should be made to him within one calendar month from the time when the decision to which it relates was given.

And it was further enacted (s. 11) that the said commissioner should make his award as therein mentioned, and that, until he should have made his award, any writing under his hand should be sufficient evidence of any proceeding or decision under the provisions of the now reciting act.

The commissioner duly appointed under the last-mentioned act proceeded under the provisions thereof to set out, and has set out, allotments from the King's Forest or King's Woods to the owners of the said fuel assignments, as a compensation for such right, and caused a plan to be made as directed by the 6th section of the act; and further proceeded to ascertain and determine the nature of the rights of common over the commonable land within the said late forest of Hainault, as also directed by the said act.

The tract called the King's Forest or King's Woods, is within the boundary and was formerly parcel of the manor of Barking, which manor was part of the possessions of the Abbess of Barking, and was seised into the hands of Henry the Eighth on the dissolution of the abbey.

The manor of Barking, excepting the King's Woods, which were retained by the Crown, was by a deed of grant dated the 10th of July, 4 Car. 1, granted by his Majesty in fee-farm to Sir Christopher Hatton and others; and, at the date of the disafforestation of the forest of Hainault (1852), was held by Sir Charles Hulse, the successor in estate of Sir *658] Christopher *Hatton, subject to a question whether under the deed of grant the soil of the King's Forest or King's Woods, therein called Chapel Henault, otherwise Estholt and Estenault, otherwise Westenault Walk, and the timber thereon, passed by the said grant; which question was settled by compromise under the disafforesting act, by a small allotment of the King's Forest or King's Woods being made to Sir Charles Hulse out of the allotment made to her Majesty.

The particulars of the common of pasture which at the time of the disafforestation and for sixty years previously was exercised over the commonable lands of the forest, and the regulations under which it was so exercised, were as follows:—

Officers called reeves were appointed for the several parishes of Barking, Dagenham, Chigwell, Lambourne, Stapleford Abbotts, Navestock, and Woodford. The vestry of each such parish nominated its own reeve, who was thereupon appointed and sworn in at the forty-day forest court. His duty was to mark all the cattle which were turned into the forest by the commoners of his parish. There were four markings in every year. With some exceptions, the commoners brought their cattle to the reeves to be marked. The marking was usually made at some place near the boundary of the forest, and within the parish to which the cattle so marked belonged: but, in the parish of Stapleford Abbotts, there was no marking place, and the reeves used to go to the commoners' residences to mark their cattle. The rule or custom touch-

ing the depasturing of the commonable lands, as proved by the reeves, was, that every person occupying property within the boundary of the forest, and choosing to turn in, was allowed to do so after the rate of one cow for every 2*l.* at which his premises, whether land or house, were rated to the relief of the poor, and one *horse for every 4*l.* rating: and those cattle only were marked which belonged to the occupiers of property within the forest. The cattle of persons occupiers of property outside the boundary of the forest were never marked. The reeves received 3*d.* per head for all cattle which they marked. They did not render accounts to any one. [*659

The cattle generally were turned out at the spot where they were marked, and then went where they pleased. Those which were turned on to the King's Forest or King's Woods, strayed over all the other commonable lands in the forest in the parishes of Chigwell, Lambourne, and Stapleford Abbotts; and the cattle turned on to the commonable lands in the last-mentioned parishes strayed over the King's Forest or King's Woods. The turning out of the cattle at the spot where they were marked, referred, according to the evidence of the reeves, to the first turning out only after the cattle were marked; the commoners may have taken their cattle afterwards, and turned them on to their own lairs.

But it was proved by two witnesses that Chigwell cattle have been driven immediately after marking over the Chigwell wastes in the forest into the King's Forest or King's Woods. One of these witnesses, Joseph Howe, the former reeve of Chigwell, proved that he had frequently known the Chigwell cattle turned out on the King's Woods: "As soon as they were marked, they went down through the wastes of Chigwell manor. Some had to be led down to the forest. Fresh ones were taken down to the King's Woods, to make them take to the forest. When they were taken down, they were taken through the wastes of the manors of Chigwell and Lambourne; but they were first turned out in the King's Woods; and fresh cattle of Chigwell not accustomed to the forest were taken down to the King's *Woods, to keep them from straying home. They could not get on the King's Woods without going through the manors." [*660

The other witness, Thomas Prest, proved that he had driven his cattle a great many times through the Chigwell wastes, and turned them into the King's Woods; that he has lived in Chigwell about thirty-five years; that he drove them down to the King's Woods, sometimes because the pasture was better there than in other places, and sometimes when he did not want them to come home so soon.

In one instance, an occupier in the parish of Stapleford Abbotts whose cattle the reeves of his parish refused to mark, procured the Chigwell reeve to mark them; and they were then turned into the forest in that neighbourhood, *i. e.* in Chigwell, and not into the commonable land in Stapleford Abbotts.

If cattle were found on the forest not marked, they were pounded: sometimes a pound was made at the May-Pole at Barking-side; sometimes they were taken to the Barking Manor Farm; but, in the fence month, they were always taken to the Lord Warden's pound at Wanstead.

The commoners of the parishes of Navestock and Woodford have

respectively confined their cattle to certain detached portions of the forest commonable lands situate in those parishes: and no question arises as to the nature of the last-mentioned common rights.

The practice as to the exercise of and control over the rights of common of pasture as stated above had existed for more than sixty years previously to and down to the time of the disafforestation; and no evidence was given of any other anterior custom or usage.

A further matter arises for the consideration of the court, viz. whether a tract called Tom's Wood Hill, situate within the parish and manor of
*661] Barking, and *within the boundary line of the said forest as ascertained by the disafforesting commissioners, and containing 44*a.* 2*r.* 23*p.*, is commonable land subject to the provisions of the said act.

The soil, timber, and underwood growing upon it belonged to Mr. Hatch, to whom the tract was conveyed by John Slade and John Blackburn and others by indenture dated the 5th of February, 1799, together with a farm called Tom-at-Wood's Farm, under the following description: "All that capital messuage or tenement commonly called or known by the name of Tom-at-Wood's, otherwise Atwood's, otherwise Fernhurst, with all and singular the outhouses, buildings, yards, and gardens, and hoppes thereunto belonging, the scite whereof contains 2 acres, more or less; and all those several pieces or parcels of land (therein described); and also all those sixty acres of woodland, be the same more or less, called Tom-at-Woods, or Tom Atwood's Hill, late in the occupation of the said John Hinchliffe, and now of the said Charles Cameron, his assigns or undertenants,—all which premises hereinbefore described, save and except the woodland mentioned to be in the occupation of the said Charles Cameron, are now in the tenure or occupation of Charles William de Valanjen."

Mr. James Mills, on whom the property has devolved, now claims Tom's Wood Hill exempt from all rights of common.

It was proved in evidence that Tom's Wood Hill is in the parish of Barking, and lies within the circuit of the forest, but is not within the boundaries of the King's Forest or King's Woods. It lay open to the forest at all times within the memory of witnesses who deposed to the fact, until it was fenced in and enclosed as hereinafter mentioned.

*662] Cattle which came from every part of the forest used *to feed on Tom's Wood Hill; and no evidence was given that any other stock were depastured there. It was covered to a great extent with bushes and fern; but there were also within it several pieces of open pasture. During a hard winter, a drove of cattle from the forest would come there, inasmuch as it was a good lairage and dry. And the deer from the forest were frequently in the habit of being on the tract.

Several witnesses deposed that the portion of Tom's Wood Hill containing 44*a.* 2*r.* 23*p.* was depastured and used in the preceding manner as far back as their memories extended, viz., for a period of sixty years and upwards, until it was enclosed and otherwise dealt with by the owner in the following manner:—

It was stated in evidence by William Webb, who is bailiff to Mr. Mills, and has been bailiff to him and the prior owners for the last thirty-seven years, that, in the year 1827, John Rutherford Hatch Abdy, now deceased, the then owner and successor in estate to the said James Hatch, enclosed a portion of land containing 15 acres which is comprised in the

preceding deed of conveyance as a portion of Tom's Wood Hill; and that such portion continued enclosed to the present time without interference.

Evidence was also given on the part of the said James Mills, by witness, that he surveyed Tom's Wood Hill many years ago by the order of the then tenant, Mr. Stringer, for the purpose of advising him whether it was worth his while to enclose it; and that he (Stringer) objected to do so, because, when he came to make a clearing of the thing, he should not get what would answer his purpose.

A further portion containing about 8 acres was in the year 1856 exchanged by the present owner, Mr. Mills, for land belonging to the commissioners of Her Majesty's woods and forests, under the powers of the *8 & 9 Vict. c. 118, s. 92; and the portion given in exchange to the said commissioners was enclosed by them, and all commonable cattle were excluded therefrom. And the said James Mills at the same time fenced in the remaining portion of Tom's Wood Hill, together with the land acquired by exchange from the commissioners of woods and forests, and containing altogether about 44 acres, and excluded from such remaining portion of Tom's Wood Hill all commonable cattle. The said enclosure took place before the passing of the 21 & 22 Vict. c. 37. The deer of the forest had been previously destroyed. [*663

The piece of ground referred to in the decision of the commissioner next hereinafter set forth, by the description of "Barking, Tom's Wood Hill, 44*a*. 2*r*. 23*p*.," comprises not only the portion of Tom's Wood Hill enclosed by the said James Mills in 1856, but also the land acquired by him in exchange from the commissioners of Her Majesty's woods and forests.

The commissioner appointed under the 21 & 22 Vict. c. 37, by a writing under his hand dated the 5th of April, 1860, decided as follows, with regard to the commonable lands situate within the boundaries of the late forest of Hainault, and the nature of the rights of common which might be exercised over them, that is to say,—

"I do determine and decide that I have found, and do hereby find, that the commonable lands situate within the boundaries of the said late forest of Hainault, other than the commonable lands within the boundaries of the King's Forest or King's Woods, as such several boundaries are defined by the award of the said disafforesting commissioners, and the plan therein referred to, consist of the following particulars, that is to say,—

			a.	*r.*	*p.*
"In the parish of		Stapleford Abbotts	131	2	26
"	"	Lambourne	196	0	34
"	"	Chigwell	776	0	32
"	"	Woodford	9	2	38
"	"	Navestock (Curtis Mill Green)	90	0	0
"	"	Barking (Tom's Wood Hill)	44	2	23
			1248	1	33

"All which said last-mentioned commonable lands, together with the commonable lands within the boundaries of the said King's Forest or King's Woods, are particularly described and delineated on the plan accompanying these presents.

"And I do also find that the owners of commonable premises within

those portions or districts of the several parishes of Barking, Dagenham, Stapleford Abbotts, Lambourne, Chigwell, Navestock, and Woodford, which lie within the boundaries of the said late forest, so ascertained as aforesaid, are entitled to exclusive rights of common (other than fuel rights) over the aforesaid commonable lands within the said forest, subject as hereinafter mentioned.

"And I do hereby ascertain and determine that the said rights of common (other than the fuel rights) hereinbefore and in the said act mentioned or referred to, which are so exercised over the said commonable lands so found to be situate within the boundaries of the said late forest, including the unallotted portion of the said King's Forest or King's Woods, do not and that none of them do extend indiscriminately over the said commonable lands including the King's Forest or King's Woods; but that the said rights of common are limited as follows, that is to say,—

"The rights of common which are exercised in respect of that part or district of the parish of Navestock which lies within the boundaries
*665] of the said (late) *forest, as such boundaries are ascertained by the said award of the said disafforesting commissioners, are limited to the common or commonable land in the particular parish of Navestock, and are not exerciseable over the other commonable lands within the said forest, or any of them.

"The rights of common which are exerciseable in respect of that part or district of the parish of Woodford which lies within the boundaries of the said forest, as such boundaries are ascertained as aforesaid, are limited to the common in the particular parish of Woodford, and are not exerciseable over the other commonable lands within the said parish, or any of them.

"The rights of common which are exerciseable in respect of those parts or districts of the several parishes of Barking, Dagenham, Stapleford Abbotts, Lambourne, and Chigwell, which lie within the boundaries of the said forest, as ascertained as aforesaid, are exercised exclusively over the commons or commonable land hereinbefore mentioned situate within such last-mentioned parishes of Barking, Dagenham, Stapleford Abbotts, Lambourne, and Chigwell, including the King's Forest or King's Woods.

"The last mentioned rights of common, or any of them, are not limited to the commons in the particular parish, district, or place in which are situate the lands in respect of which the said rights are claimed. But the said rights claimed for each of the last-mentioned parishes, districts, or places, extend indiscriminately and generally over all the said commons or commonable land in each and every of the same parishes, districts, or places, including the King's Forest or King's Woods."

The following parties interested gave notice to the said commissioners of their dissatisfaction with his decision, or with some portion thereof, that is to say,—

*666] *By a memorandum in writing, dated the 20th of April, 1860, the Hon. Charles Alexander Gore, on behalf of the commissioners of Her Majesty's woods, gave a notice of which the following is a copy:—

"Hainault Forest (Allotment of Commons) Act, 1858.

"Take notice that I, the Hon. Charles Alexander Gore, as commissioner of Her Majesty's woods, forests, and land revenues, in charge of the land revenues of the crown in the county of Essex, am dissatisfied with so much of your decision dated the 5th day of April inst., made under the Hainault Forest (Allotment of Commons) Act, 1858, as ascertains and determines that the rights of common which are exercised or claimed in respect of those parts or districts of the several parishes of Stapleford Abbotts, Lambourne, and Chigwell, which lie within the boundaries of the late forest of Hainault, extend indiscriminately and generally over all the commons and commonable lands in each and every of the parishes, districts, or places mentioned in your said decision, including the King's Forests or King's Woods; and that I am also dissatisfied with your said decision, because the same does not ascertain and determine that the said rights of common so exercised or claimed as aforesaid do not nor do any of them extend over the commons and commonable lands in the said King's Forest or King's Woods, or any part thereof, and because the said decision does not ascertain and determine that the owners and occupiers of land in those parts of the parishes of Barking and Dagenham which lie within the boundaries of the said forest are alone entitled to rights of common over the commons and commonable lands in the said King's Forest or King's Woods: and I do, pursuant to the provisions of the said act, hereby apply to you to prepare a case in regard to the matters aforesaid, to be submitted to Her Majesty's Court of Common Pleas, and *to be argued before and decided on by the said court. Dated this 19th day of April, 1860. [*667

"Charles A. Gore, { Commissioner of Her Majesty's woods, forests, and land revenues, 1, Whitehall Place, Westminster."

"To Nathan Wetherell, Esq., Lincoln's Inn, the commissioner for carrying the above-mentioned act into execution."

By a memorandum in writing, dated the 2d of May, 1860, Messrs. Druce & Sons, on behalf of the Rev. Thomas Mills, Charles Druce, and James Mills, gave a notice, of which the following is a copy:—

"To Nathan Wetherell, Esq., barrister at law, the commissioner appointed under the Hainault Forest (Allotment of Commons) Act, 1858:—

"Whereas, by your decision given in this matter on the 5th of April last, you do decide and find, among other things, that the commonable lands situate within the boundaries of the late forest of Hainault, other than the commonable lands within the King's Forest or King's Woods, do consist of the following particulars, that is to say,—

		a.	r.	p.
"In the parish of	Stapleford Abbotts	131	2	26
" "	Lambourne	196	0	34
" "	Chigwell	776	0	32
" "	Woodford	9	2	38
" "	Navestock (Curtis Mill Green)	90	0	0
" "	Barking (Tom's Wood Hill)	44	2	23
		1248	1	33

"Now, we do hereby give you notice that the Rev. Thomas Mills, of, &c., and Charles Druce, of, &c., trustees of the settled estates of James Mills, Esq., and the said James Mills, tenant for life in possession of

*668] the same estates, being owners of the said plot of land *called Tom's Wood Hill, are dissatisfied with your said decision of the 5th of April, 1860, so far as the same affects the said plot of land called Tom's Wood Hill, and do hereby appeal therefrom: And we do hereby, on their behalf, request you to prepare a case to be submitted to Her Majesty's Court of Common Pleas, as provided by the said act."

By a memorandum in writing, dated the 5th of May, 1860, Anne Walford gave a notice, of which the following is a copy:—

"To Nathan Wetherell, Esq., barrister at law, the commissioner appointed under the Hainault Forest (Allotment of Commons) Act, 1858, for carrying into execution the provisions of the said act:—

"I, the undersigned Anne Walford, being dissatisfied with your decision of the 5th of April, 1860, with reference to the nature of the rights of common therein comprised and referred to, do hereby apply to you as such commissioner to prepare a case to be submitted to Her Majesty's Court of Common Pleas: And I do hereby further give you notice that the ground on which I am dissatisfied with your said decision, is, that you thereby determine that the rights of common of pasture therein referred to extend indiscriminately over all the commonable lands which at the time of giving your said decision were and are now situate within the boundaries of the late forest of Hainault, in the county of Essex; and that the point which I require to be raised for the decision of the said court, is, that the owners and occupiers of property within the parishes of Barking and Dagenham are not entitled to rights of common of pasture over that portion of the commonable lands referred to in your decision which lies out of the said parishes of Barking and Dagenham, and out of the boundaries of the King's Woods; but that the *669] rights of common of *pasture over such portion of the said commonable lands are limited and confined to the owners and occupiers of property within the parishes situate within the boundaries of the late forest of Hainault, other than the said parishes of Barking and Dagenham."

The acts of parliament above referred to, the award of the disafforestation commissioners, and the plan therein mentioned, and the plan hereto annexed, which shows the King's Woods and the other commonable land within the parish so far as is necessary for the purposes of this case, were to be read and referred to as part of the case.

The questions for the opinion of the court were,—first, whether the rights of common of pasture which may be exercised over the commonable lands situate within the boundaries of the late forest of Hainault extend indiscriminately over all the said commonable lands, including all the unallotted portion of the King's Forest or King's Woods, containing 969*a.* 3*r.* 17*p.*, or whether such rights, or any of them, are limited to the commons in the particular parish, district, or place in which are situate the lands in respect of which the rights are claimed, or what is the nature of such rights?—Secondly, whether or not the tract called Tom's Wood Hill, containing 44*a.* 2*r.* 23*p.*, or any part thereof, is now part of the commonable lands within the boundaries of the said forest, and subject to the provisions of the said act.

The Solicitor-General (with whom was *M'Mahon*), who appeared for the Crown, was not instructed to offer any opposition to the award of the commissioner.

Walford appeared for Mrs. Anne Walford, who insisted that the award of the commissioner was bad in respect of its finding that the rights of common *claimed in respect of lands in the parishes of Barking, [*670
Dagenham, Stapleford Abbotts, Lambourne, and Chigwell, extended indiscriminately and generally over all the commonable land in each and every of those parishes, including the King's Forest or King's Woods,—the owners and occupiers of property within Barking and Dagenham not being entitled to rights of common of pasture over that portion of the commonable lands referred to in the award which lay out of those parishes and out of the boundaries of the King's Woods; but that the rights of common of pasture over such portion of the said commonable lands were limited to the owners and occupiers of property within the parishes situate within the boundaries of the late forest of Hainault other than the parishes of Barking and Dagenham. The rights of common over the King's Woods should have been allotted to the five parishes above named, and the commonable lands in the three northern parishes of Stapleford Abbotts, Lambourne, and Chigwell, ought not to have been dealt with at all, or the commissioner should have left each parish to enjoy its own exclusive rights. The real question is, whether Barking and Dagenham are to have any share in wastes of the three northern parishes. The case resolves itself into three points,—1. That it appears from the evidence set out upon the case that the claim in respect of the two southern parishes is only of a custom, whereas a right of common over private lands in a forest can only be claimed by grant or by prescription,—2. That all that is shown to create a right in Barking and Dagenham to common over the wastes of the other three parishes, is, that their cattle have strayed thereon,—3. That the award of the commissioners, so far as it finds the right in the two southern parishes, is a finding of a forestal right, which militates against the enactment of the *9th chapter of the Charta de Forestæ (9 [*671
H. 3), which enacts that "every freeman may agist his own wood within our forest at his pleasure, and shall take his pawnage."

1. The only evidence here was of a practice or custom prevailing in these parishes; and there is nothing to show that any inhabitant of Barking or Dagenham had acted upon this supposed custom so as to acquire a right. [ERLE, C. J.—Has it ever been laid down that the waste within the boundary of a forest may be presumed to be in the lord of the manor? There is *evidence* here that it is so: but it is not so found.] There is a statement in the case that from time to time parcels of the manors have been granted by the lords with the consent of the homage. A profit à prendre in alieno solo can only be claimed by prescription or grant: Blewet *v.* Tregonning, 3 Ad. & E. 554 (E. C. L. R. vol. 30), 5 N. & M. 234 (E. C. L. R. vol. 36). And that applies to private land in a forest. In Manwood's Forest Laws, c. 14, s. 3, it is said: "At common law there are four sorts of common, that is to say, common appurtenant, common appendant, common in gross, and common per vicinage. Common appurtenant is where a man is seised of the messuage and certain land unto the which messuage and land the common is appurtenant. And it is to be noted, that, at the common law, common appurtenant is, to have common for all manner of beasts and cattle, as well for such as are commonable as for such beasts that are not commonable, that is to say, for geese, goats, sheep, and swine; and therefore

no man may have such common appurtenant for all manner of beasts within a forest without a special grant from the King or owner of the forest. A man may have common appurtenant unto a messuage and to certain land for such beasts as are commonable within a forest, which is
*672] for all manner of beasts except geese, goats, sheep, and swine, for *these beasts are not commonable within a forest." In s. 4, the learned author proceeds to consider who ought to have common within the forest: "And concerning this point, who shall have common within a forest, both by the common law and by the forest law, it seemeth to me, as I do understand it, that he that is an inhabitant within a forest, and can prescribe to have common within the King's waste soil, or within the waste soil of any other lord within the forest, as appurtenant unto his dwelling-house only, or unto a dwelling-house and certain land, with beasts commonable within a forest, this is a good prescription at the common law, and therefore good by the forest law; because there is no law nor ordinance of the forest against it: and therefore he that can so prescribe shall have common within a forest according to his prescription. And a man may prescribe to have common by reason that he is an inhabitant within such a town which is an ancient town, and that within the same town there is a custom that hath been used before the memory of man that all the inhabitants within the same town have used to have common within a certain place for all manner of beasts commonable that are levant and couchant within the same town; and this is a good prescription for common at the common law: and it seemeth that such a prescription made for common within a forest is a good prescription. But a man cannot prescribe to have common by reason of his inhabitancy, that dwelleth in any new erection; for, all new erections that are made within any forest are purprestures by the laws of the forest: and therefore they that do well in new erections may not prescribe to have common by reason of their inhabitancy only." In s. 5 he proceeds to show who ought not to have common within the forest: "And even as
*673] he that hath a charter or other title of *prescription to have common within a forest in any of those degrees aforesaid, may lawfully use and enjoy the same accordingly by the laws of the forest, so, on the contrary part, he that hath neither charter to common within the forest nor can prescribe to have common there in any of those three degrees aforesaid, is not allowed by the forest laws to common within a forest." And this is adopted by Chief Baron Comyns, Com. Dig. title *Chase* (O. 3), (O. 4). Inhabitants, as such, cannot prescribe for common: Inhabitants de Haley, Sir W. Jones 297; Gateward's Case, 6 Co. Rep. 59 b; Fowler *v.* Dale, Cro. Eliz. 362. Their interest is too transient and fugitive. A custom to take a profit in alieno solo is bad: such a right can only be claimed by prescription: Grimstead *v.* Marlowe, 4 T. R. 717. "It is an elementary rule of law that a profit à prendre in another's soil cannot be claimed by custom, for this, among other reasons, that a man's soil might thus be subject to the most grievous burdens in favour of successive multitudes of persons, like the inhabitants of a parish or other district, who could not release the right:" per Byles, J., The Attorney-General *v.* Mathias, 27 Law J., Ch. 761, 766. And see note (3) to Mellor *v.* Spateman, 1 Wms. Saund. 340 *c*. It does not appear to what extent the right has been exercised by the occupiers of lands in Barking and Dagenham: and, upon the fair construction of

the 6th section of the 21 & 22 Vict. c. 37, a district right could not be awarded in respect of individual rights. To authorize the commissioners to set out a parochial or district right, it should appear that all the occupants in the district have the right.

2. The acts done by the owners of lands in Barking and Dagenham had not ripened into a legal claim. All that appears, is, that the cattle, when marked, were turned out to go where they pleased,—not that they *turned out upon the wastes belonging to the three northern parishes. The case falls within the principle of The Attorney-General *v.* Chambers, 4 De Gex & J. 55. There the question was whether turning of cattle upon alluvium by the proprietor of land not separated from it by any boundary, without interruption, raised a presumption of title; and the Lord Chancellor (Lord Chelmsford) said: "The defendant Lewis claims the sea-shore in front of this part of his property, upon the ground of uninterrupted enjoyment for sixty years. During the course of the argument, I intimated a strong opinion that the acts of ownership upon which the defendant relies were quite insufficient to prove actual possession. They consisted merely of turning out upon the marsh the cattle of the defendant, which crossed the invisible line of boundary separating the marsh from the sea-shore, and the cattle being allowed thus to stray without interruption. But the effect of acts of ownership must depend partly upon the acts themselves and partly upon the nature of the property upon which they are exercised. If cattle are turned upon enclosed pasture ground, and placed there to feed from time to time, it is strong evidence that it is done under an assertion of right: but, where the property is of such a nature that it cannot be easily protected from intrusion, and if it could it would not be worth the trouble of preventing it, there, mere user is not sufficient to establish a right, but it must be founded upon some proof of knowledge and acquiescence by the party interested in resisting it, or by perseverance in the assertion and exercise of the right claimed in the face of opposition." So here, the very nature of the land precluded the fencing out the straying cattle. [*674

3. If the finding of the commissioner is supported, it will be a direct violation of the 9th chapter of the *Charta de Forestæ. It is assigning a right in another man's land, and is quite inconsistent with that provision. The commissioner should have found that there were persons in Barking and Dagenham who had the right, and the extent of that right, and then assigned a district. [*675

Macauly, Q. C. (with whom was *Honyman*), for James Mills, the owner of Tom's Wood Hill.—The evidence set out upon the case does not warrant the finding that Tom's Wood Hill is commonable land. It was formerly, and within living memory, unenclosed woodland, the owner making such use of it as land of that description is susceptible of. It appears that certain commonable cattle turned out in the forest were in the habit of straying thereon, that thirty-three years ago the then owner enclosed fifteen acres of it and was never interfered with, that four years ago he sold four acres more of it to the commissioners of woods and forests, and then enclosed the residue, together with the land he obtained from the Crown in exchange for those four acres. There is no evidence that the owner had any knowledge of the trespassing of other persons' cattle there; nor was it shown whose were the cattle that

did depasture there, or that any cattle were ever turned on the land in question. It is submitted, that, under the circumstances, the 6th section of the 21 & 22 Vict. c. 37 gave the commissioner no jurisdiction to decide this question at all: nor is it by any means a convenient mode of deciding it. [WILLIAMS, J.—The act certainly directs him to do it. Can we set aside his award because he has done his duty?] The state of things at the time of the passing of the 21 & 22 Vict. c. 37 was that the land in question was *enclosed*. At the end of s. 6 it is declared *676] "that all encroachments made since the award of the *commissioner under the 14 & 15 Vict. c. 43, on any part of the said 969*a*. 3*r*. 17*p*. *within the boundaries of the King's Forest or King's Woods* should be deemed to be part of the lands to be allotted under the provisions of the said act." Why is the commissioner's power to deal with enclosed land to be limited to encroachments in the King's Forest or King's Woods? Evidently it is because the earlier part of the section is confined to lands *now* subject to commonable rights. If it was competent to the commissioner to include in his award the land enclosed in 1856, what was there to prevent his including in it the fifteen acres enclosed in 1827?

Manisty, Q. C., for the respondent, was desired by the court to confine himself to Mills's appeal. The commissioner has a duty imposed upon him by the 6th section of the 21 & 22 Vict. c. 37. He is required to ascertain and determine by his award whether the rights of common, or any of them, other than fuel rights, in the late forest of Hainault, extended indiscriminately over all the said commonable lands which he might find to be situate within the boundary of the said late forest, including the unallotted portion of the King's Forest or King's Woods, or whether such rights, or any of them, were limited to the commons in the particular parish, district, or place in which are situate the lands in respect of which the rights were claimed, or what was the nature of such rights: and, in case he should find that the rights of common, or any of them, were exerciseable generally over all the commonable lands within the said late forest, or over any other commonable lands than those in the parish, district, or place in respect of which the rights exist, or if he should find that the inhabitants of the parishes in which *677] the commonable lands in the King's Forest or *King's Woods are situate were alone entitled to rights of common over such lands, then the commissioner should by his award set out a specific portion of the said commonable lands in any part of the said late forest of Hainault to each parish, district, or place in which the inhabitants had rights of common, as and for a common for such parish, district, or place. Upon the evidence before him, he has come to the conclusion that Tom's Wood Hill is commonable land. That evidence was, that, for sixty years and upwards, it lay open to the forest, that cattle (of the commoners) from every part of the forest used to feed there, and that no other stock were depastured there. The only evidence to contravene that, was, that Mr. Mills, in 1856, exchanged a small portion of the land with the commissioners of woods and forests, and enclosed the remainder, and from that time excluded the cattle of the commoners from the exercise of their rights thereon. Upon this evidence, the commissioner could hardly arrive at any other conclusion than that at which he did arrive. The enclosure of the 15 acres in 1827, which is

relied on by the objector, has no bearing upon the question now before the court. The only question to be determined is, whether the 44*a*. 2*r*. 23*p*. is properly subject to the exercise of the commonable rights mentioned in the award. [WILLIAMS, J.—I see nothing on the face of the case to show that this land was not subject to the same rights of common as the rest of the lands dealt with by the commissioner.]

Honyman was heard in reply.

ERLE, C. J.—I am of opinion that the award in this case ought to be supported. The appeal which we have last heard is in respect of forty-four acres of land, the title to the soil of which is clearly in Mr. Mills: *but it is insisted on the part of the commoners that it [*678 is subject to rights of common; and the evidence in support of that claim consists of acts of user, which upon questions of this nature must always be left to be decided by the tribunal which has to decide the whole question. These forty-four acres, it seems, consist chiefly of pasture—there being some fern, some bushes, and some wood. Who has had the profits in the way of pasturage? The evidence is, that, as far back as living memory extends, the cattle of the commoners have gone over these forty-four acres without interruption or objection; and there is no evidence that the owner of the soil ever exercised the exclusive right which he now sets up prior to the year 1856. The enclosure of the fifteen acres more than twenty years ago stands by itself. It might have been by license from the parties interested, or it may have been an encroachment. The commissioner seems to me to have done his duty in not interfering with that: the length of possession put it beyond his control.

With regard to the enclosure of 1856, if the land then enclosed was subject to rights of common, it was commonable land notwithstanding such enclosure. It was a question of evidence; and the commissioner has found the balance to be in favour of the right of common, and I see no ground for differing from the conclusion he arrived at. The commissioner had to decide what was commonable land: and the fact of the enclosure having been made just before the act passed under which his authority was derived, does not seem to me to exclude his jurisdiction. The proviso at the end of s. 6, that all encroachments made since the award of the commissioners under the 14 & 15 Vict. c. 43, on any part of the land within the boundaries of the King's Forest or King's Woods, should be deemed to be part of the lands to be allotted under the [*679 *provisions of the said act, is an affirmation, but it is not accompanied by an exclusion of other encroachments which might have been made before that time. It seems to me that the commissioner was right in finding that these lands were commonable lands, and so within his jurisdiction.

With respect to the other question in the case, which has been so ably argued by Mr. *Walford*,—the duty which was intrusted to the commissioner by section 6, was, to take the area of land subject to commonable rights, and then to decide whether each parish should have an exclusive right of common over the commonable lands within the boundary of that parish, or whether two or more of the parishes should have all the commonable lands within the boundaries of those parishes as a separate district, or whether the occupiers of commonable tenements in all the five parishes who claimed to have rights of common over the common-

able land, should be considered as occupiers of commonable tenements in one district. That was the matter which the commissioner had to decide: and he has decided that two of the parishes take each the commonable lands within the boundaries of each, that is, that the occupiers of commonable tenements in each of those parishes take the exclusive right over the commonable lands within the boundaries of their respective parishes; and that, as to the other five parishes, they form one district in respect of the rights over the commonable lands within those parishes. No doubt a large portion of that which was applicable to the parishes of Dagenham and Barking is King's Wood, which is an entirely separate district, subject to a separate allotment under arrangement with the Crown, and given up to be divided amongst those who shall have commonable rights. There is hardly anything, indeed nothing, in
*680] Dagenham which is peculiar *to that parish; and in Barking only the forty-four acres just adverted to, which is beyond King's Woods. Then, in respect of the parochial commons as contra-distinguished from the Royal lands of King's Woods, the question who are the parties entitled, and in what manner, was to be decided entirely by the acts of user given in evidence. Now, the evidence set out in the case is, that the occupiers of what were considered to be commonable tenements turned out their cattle into this commonable area, and that the cattle so turned out wandered without hindrance and without distinction over the whole of the parochial commonable lands and over the Royal lands within King's Woods: and that, as it seems to me, is good evidence that the occupiers of commonable tenements in all the five parishes had a similar right, and that the whole formed one district in respect of which the remaining commonable area was to be allotted to them.

The point made by Mr. *Walford* which had a considerable aspect of materiality when first brought forward, was, that the claim was by the inhabitants of the parish or township as such, and therefore was a claim of a profit in alieno solo, by custom, whereas a claim of that sort can only be supported by prescription or grant; and that, if it was claimed on behalf of an undefined unincorporated body, such as the inhabitants of a parish or a township, it would not be capable of grant, and therefore the right claimed could have no legal existence. But it was only necessary to examine the award a little more carefully to meet that difficulty. The commissioner is to inquire, in respect of the persons entitled to commonable rights, how they are entitled, that is, what rights they previously possessed. He has found that the occupiers of commonable tenements in all the five parishes had all similar and equal rights, and
*681] therefore that the commonable *lands in the five parishes are to be taken as one district.

It is said that the acts of user were insufficient, because the inhabitants, according to the evidence, turned on their cattle at some place near to the boundary of the forest and within the particular parish. But, once turned out, the cattle, it appears, were allowed to stray where they pleased over all the commonable area: and that would be quite enough for a jury, if the matter had to be left to a jury to decide.

The third point was, that the claim was void by reason of the 9th section of the Charta de Forestæ, which enacts that the owner of the soil shall be entitled to the agistment and pannage within his own land

in the forest. No doubt there is that enactment; and possibly the lords of the manors might claim to have the agistment and pannage within the boundaries of their manors, if any attempt were made to afforest the lands. Prior to the passing of that statute, it had been the custom of the Crown then having forest lands to claim exclusive rights in respect of them: and, when any question of that sort arises, the statute has provided a saving of the rights of the owners of the land. That, however, does not at all interfere with the liability of the lands in the hands of an individual owner to rights of common in the ordinary way, although the lands happen to be within the ambit of the forest. Upon the whole, I think the award of the commissioner was right.

WILLIAMS, J.—I am quite of the same opinion. With respect to the first point, I need scarcely say that there is nothing which the court means to decide in this case that in any way interferes with the rule of law which has been thoroughly established ever since *the time [*682 of Lord Coke, viz., that, where an interest or a profit is claimed in another man's soil, it must be claimed by grant or prescription and not by custom, except in the case of copyholds granted by the lord. No doubt, the parties entitled in this particular case to rights of common in the respective parishes, have for the more convenient exercise of those rights treated them rather as rights which the inhabitants or occupiers were entitled to by reason of their inhabitancy or occupancy than as rights appurtenant to the respective tenements which they occupied. Nevertheless, I think that the right so recognised in this act of parliament is a right which is not founded upon a custom that the occupiers of messuages within their respective parishes shall have the right of common over all the lands in question, but it is founded upon the right appurtenant to the tenements so occupied. As to the second point,—which relates to Mills's case,—I entirely agree with my Lord that it was the duty of the commissioner to ascertain the fact of the existence of the right, and that there were materials to justify the conclusion at which he arrived.

WILLES, J., and KEATING, J., concurred.

Judgment for the respondent.

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*In the matter of an Arbitration between JOHN COOPE HADDAN and WILLIAM ROUPELL. *Jan.* 20. [*683

An agreement between A. and B. contained the following clauses,—"In every case of any difference between the parties hereto, or their representatives, whether touching the true intent or construction of this agreement or of anything therein expressed, or touching anything to be done or omitted in pursuance of this agreement, or as to any of the incidents or consequences thereof, or otherwise relating to the premises, the matter in question shall be referred to arbitration." "Every such reference shall be made to two persons, one to be named by each party." "If either party for fourteen days after being requested by the other party to name an arbitrator, fail so to do, then both arbitrators may be named by the party making such request."

Differences having arisen, A. appointed an arbitrator, but B. declined to do so on request, whereupon A. appointed a second arbitrator; and the two proceeded to hear and dispose of the matter.

The appointment of the arbitrators purported to be made by A. *and one C.* (who was said to be an encumbrancer on A.'s presumed interest under the agreement) *severally*, and the notice

was also given by A. *and C.*:—Held, that the appointments were not vitiated by the introduction of the name of C.

Held, also, that it was not necessary in the appointment of the arbitrators to particularize the matters to be arbitrated upon.

Held, also, that the request of B. to appoint an arbitrator was not rendered invalid by its requiring him to notify the appointment to the solicitors who had been acting for A. throughout the matter, instead of to A. himself.

By articles of agreement made the 1st of August, 1855, between John Coope Haddan, of Cannon Row, civil engineer, of the one part, and William Roupell, of Ashen House, Streatham, Esq., of the other part, —after reciting that a bill was then pending in parliament, intituled "A bill for making a railway from the Manor Street terminus of the authorized Westminster Terminus Railway, in the parish of Clapham, in the county of Surrey, to Norwood, in the parish of St. Mary, Lambeth, in the same county," connecting the Westminster Terminus Railway with the West End of London and Crystal Palace Railway; that the said John Coope Haddan was one of the promoters of the pending bill, and had, as he did thereby declare, full authority to enter into that agreement so as to bind thereby all the promoters of the bill; that the proposed line of railway passed through an estate belonging to the said William Roupell which he had laid out as building ground, and he apprehended that the making of the proposed railway in the proposed line would so interfere with his building arrangements as *to be seriously prejudicial *684] to him, and thought that by an alteration of the line his own interests might be reconciled with the interests of the public; that the proposed capital for the undertaking was 148,000*l.*, to be divided into 14,000 shares of 10*l.* each; that the sum of 122,000*l.*, part of the proposed capital of 148,000*l.*, had been subscribed for, and the sum of 10,912*l.* 10*s.* had been deposited with the Court of Chancery in compliance with the standing orders of the House of Commons; and that, on the 25th of June, 1855, the said William Roupell paid to the said John Coope Haddan, as he did thereby acknowledge, the sum of 750*l.*, as part of the consideration for that agreement,—it was mutually agreed as follows, to wit, "Article 1. The said William Roupell will on the 20th day of July, 1855, pay to the said John Coope Haddan the sum of 750*l.*, that sum making, with the sum of 750*l.* paid as hereinbefore recited, the sum of 1500*l.*, in full discharge of the said William Roupell from all claims and demands whatsoever for or in any way relating to the expenses and liabilities paid or incurred up to the 25th day of June, 1855, with reference to the pending bill: Article 2. The said William Roupell will on or before the 3d day of August, 1855, pay to the several subscribers to the undertaking, by payment to the credit with the London and County Bank of James Andrew Durham and James Rhodes of the sum of 10,912*l.* 10*s.*, and to the said John Coope Haddan of the sum of 152*l.* 1*s.* 8*d.*, on a legal and effectual transfer being made to the said William Roupell of all the scrip, shares, right, and interest whatsoever of those subscribers in the undertaking, including all benefit and interest in the sum of 10,912*l.* 10*s.* deposited in the Court of Chancery, such transfer to be made by an indenture of which the draft has been prepared and agreed on between the parties hereto: Article 3. As from *685] the 25th day of *June, 1855, the said William Roupell shall be the sole promoter of the undertaking, and shall have the exclu-

sive control of the application to parliament for the pending bill, and of all matters incidental thereto, and shall bear and pay all expenses as from the 25th of June, 1855, in any way relating to the pending bill, and the application for the same, and otherwise relating to the undertaking, and to the preparation, execution, and carrying into effect of this agreement, and shall by the indenture referred to in Article 1 covenant with the subscribers and the said John Coope Haddan to indemnify them against all such expenses: Article 4. If the pending bill do not pass into a law in the present session, the said William Roupell will apply for and take all necessary steps for obtaining, and use his utmost reasonable endeavours to obtain before Michaelmas Day, 1856, an act for the making of a railway either between the same termini as the proposed termini of the proposed railway, or, at his option, from the Clapham terminus of the Westminster Terminus Railway to the western side of Streatham Road, so as to form a junction with the West End of London and Crystal Palace Railway, or between such other points, if any, as the parties hereto mutually agree upon: Article 5. If the pending bill do not pass into a law in the present session, then the said John Coope Haddan will, if so required by the said William Roupell, co-operate with him in applying for and endeavouring to obtain in the next session such an act as is provided for by Article 4: Article 6. The said William Roupell will pay all the expenses of and incident to the preparing and applying for and (if obtained) the obtaining and passing of the act provided for by Article 4; those expenses to include a fair payment to the said John Coope Haddan for his services, according to Article 5: Article 7. If the pending bill pass into *a law in the present session, and the railway thereby authorized [*686 be not completed for public use before the 25th of June, 1860, then the said William Roupell will on that day pay to the said John Coope Haddan the full sum of 5000*l.* as and for liquidated damages, unless an act authorizing the making in lieu of the now proposed line of railway of another line of railway be obtained, and such other line of railway be on or before that day completed for public use, in which case no part of that sum of 5000*l.* shall be payable: Article 8. In every case of any difference between the parties hereto or their respective representatives, whether touching the true intent or construction of this agreement or of anything therein expressed, or touching anything to be done or omitted in pursuance of this agreement, or as to any of the incidents or consequences thereof, or otherwise relating to the premises, the matter in question shall be referred to arbitration: Article 9. Every such reference shall be made to two persons, one to be named by each party: Article 10. If either party for fourteen days after being requested by the other party to name an arbitrator, fail to do so, then both arbitrators may be named by the party making such request: Article 11. If the two arbitrators do not within thirty days next after the matter in question is referred to them agree on their award thereon, then it shall be referred to the umpirage of such one person as the two arbitrators before entering on the business of the reference nominate as their umpire, or, if they fail for ten days after their appointment to name an umpire, then to the umpirage of such one person as the president of the Institution of Civil Engineers, on the application of the two parties, or either of them, appoints to be the umpire: Article 12. The award of the two arbitrators,

or, as the case may be, of the umpire, if made in writing under their
*687] *or his hands or hand, and ready to be delivered to the two parties within thirty days next after the question in difference is referred to the arbitrators, or, as the case may be, to the umpire, shall be conclusive and binding on both parties, and all things shall be forthwith thereafter done, omitted, or suffered as by such award is required: Article 13. The arbitrators and the umpire respectively shall have full power to make, if they and he think fit, several awards instead of one award, and every such award though not on the whole matter shall be conclusive so far as it extends: Article 14. The arbitrators and the umpire respectively shall have full power to proceed ex parte, or in the absence of both parties, after giving to both parties such notice as the arbitrator or the umpire respectively think sufficient of their and his intention so to proceed: Article 15. The arbitrators and the umpire respectively shall have full power to examine on oath, if required by either of the arbitrators or by the umpire, the parties and their witnesses: Article 16. The umpire shall have full power by writing under his hand from time to time to extend the period of thirty days within which his award is to be [made]; and, if it be made and ready to be delivered to the two parties within such extended period, it shall be binding and conclusive as if made within such period of thirty days: Article 17. The costs of the reference shall be in the discretion of the arbitrator and umpire respectively: Article 18. The submission to reference made by these presents may at any time be made a rule of any court of law or equity on the application of any party or person interested; and the court shall have full power to remit the matter to the arbitrators or the umpire, with such directions as the court think fit: Article 19. Full effect shall be given under the Common Law Procedure Act, 1854,
*688] and every or any other act from time *to time in force and applicable in that behalf, to the several terms and conditions of these presents, with respect to arbitration."

Differences having arisen between the parties, the following award was made on the 5th of September, 1860:—

"To all to whom these presents shall come, we, Sir Charles Fox, Knt., of, &c., and John Bethell, of, &c., send greeting: Whereas the following articles of agreement were on the 1st of August, 1855, made and entered into between John Coope Haddan, civil engineer, of the one part, and William Roupell, Esq., of the other part [setting it out]: And whereas, after the 25th day of June, 1860, a difference arose between the said John Coope Haddan and the said William Roupell as to whether the sum of 5000*l.* mentioned in the seventh article of the said articles of agreement had become payable and was to be paid by the said William Roupell to the said John Coope Haddan: And whereas, on or about the 28th of July, 1860, and after the said difference had arisen, the said John Coope Haddan did by writing under his hand duly nominate me the said John Bethell as an arbitrator on his behalf, and to be one of the two arbitrators to whom the said difference should be referred, in accordance with the said articles of agreement; which appointment I the said John Bethell accepted: And whereas, on the said 28th of July, 1860, the said John Coope Haddan gave notice to the said William Roupell of the appointment of me the said John Bethell as such arbitrator, and in writing under his hand, duly served upon the said William

Roupell, requested the said William Roupell to name an arbitrator on his behalf to be the other of such two arbitrators: And whereas the said William Roupell did not within fourteen days after such request or at all name or appoint such other arbitrator: And *whereas, therefore, upon the 13th of August, 1860, and more than fourteen [*689 days after such request, the said John Coope Haddan did by writing under his hand nominate and appoint me the said Sir Charles Fox as an arbitrator to act with the said John Bethell, and to be the other of such two arbitrators, in accordance with the said articles of agreement, —of which notice was given to the said William Roupell; which appointment I the said Sir Charles Fox accepted: And whereas we the said arbitrators, within ten days after such last-mentioned appointment, and before entering on the business of the reference, duly nominated and appointed an umpire in accordance with the said articles of agreement: Now, we the said arbitrators, having taken upon ourselves the burthen of the said arbitration, and having heard and considered the evidence given before us thereon, do make and publish this our award in writing under our hands of and concerning the premises: 1. We award and determine that the sum of 5000*l.* mentioned in the seventh article of the said articles of agreement did on the 25th of June, 1860, become payable under that article by the said William Roupell to the said John Coope Haddan: 2. We award and direct that the said William Roupell do forthwith pay to the said John Coope Haddan the said sum of 5000*l.* and also interest thereon at the rate of 5*l.* per cent. per annum from the said 25th of June, 1860, up to the date of this our award: 3. We award and direct that the said William Roupell do pay to the said John Coope Haddan his costs of and incidental to the reference and award, and that the said William Roupell do bear his own costs of the same: In witness," &c.

Bovill, Q. C., in Michaelmas Term last, on behalf of *Mr. [*690 Roupell, obtained a rule calling upon Haddan to show cause on the first day of this term why the above award should not be set aside, on the grounds,—"first, that one Clapham interfered in the appointments of Messrs. Bethell and Fox and in the request to Mr. Roupell to appoint an arbitrator,—secondly, that the appointment of the arbitrators did not state the matters to be arbitrated upon,—thirdly, that the request to Mr. Roupell to appoint an arbitrator in writing addressed to Messrs. Freshfield & Newman was not in accordance with the agreement,"—the said Mr. Roupell by his counsel thereby consenting, in the event of the rule being discharged, to pay to the said J. C. Haddan interest upon the sum awarded, to the time of payment thereof.

The motion was founded upon affidavits by Mr. Roupell and Messrs. Whitaker & Woolbert, his attorneys.

Mr. Roupell's affidavit was in substance as follows:—In the year 1854, an act of parliament was passed for making a railway from the parish of St. John the Evangelist, Westminster, to Clapham, in Surrey, with a branch from such railway to join the authorized line of the West End of London and Crystal Palace Railway at Long Hedge Farm, in the parish of St. Mary, Battersea, in the county of Surrey, the short title of which was "The Westminster Terminus Railway Act, 1854." The said act contains the following proviso:—"Provided that the powers by this act granted for the purchase of lands and

construction of works shall not be exercised as regards the portion of railway between the points marked one mile six furlongs on the plans so deposited as aforesaid, and the terminus at Clapham, until parliament shall have sanctioned an extension of such railway from such terminus to the Crystal Palace, or to a junction with the authorized
*691] *line of the West End of London and Crystal Palace Railway in a south-easterly direction from such terminus. In the session of 1859, application was made to parliament for an act (to be called "The Westminster Terminus Railway Extension Act, Clapham to Norwood, 1855,") for making a railway from the Manor Street terminus of the authorized Westminster Terminus Railway to Norwood, connecting the Westminster Terminus Railway with the West End of London and Crystal Palace Railway. The line of railway contemplated by the last-mentioned act, as defined in the plans and sections in the act referred to, was projected to cross a large building estate belonging to the deponent, known as Roupell Park, on an embankment; and the deponent was advised that the effect of the construction of the said railway would be very detrimental to the said estate. The deponent therefore petitioned the House of Commons against the measure, with the view of obtaining its rejection or such modifications as might protect his interests. Not being successful before the committee of the House of Commons, the deponent was preparing to continue his opposition in the House of Lords, which he would have prosecuted had he not been applied to by Mr. J. C. Haddan, representing himself to be the proprietor and promoter of the undertaking, who, accompanied by his parliamentary agent, called on the deponent and proposed to him to become the proprietor of the undertaking, and to obtain, if he thought proper, in the next session, an act for making such a deviation of the proposed line as might remove his objection to it: and, after some discussion, a memorandum (which was afterwards embodied in the agreement of the 1st of August, 1855) was drawn up and signed by the deponent and Haddan. It was expressly stated to the deponent at the time by Haddan that the reason for
*692] *his stipulation for the payment of 5000*l.* in the event of the line not being made within the period mentioned in the said memorandum, was, that he had an interest to that amount dependent on the construction of the line authorized by the said Westminster Terminus Railway Act, 1854; and that, as such construction necessarily depended on the construction of the extension line contemplated by the then pending bill, it was reasonable that in parting with the control of such extension line he should have some practical guarantee that it would not be abandoned to the injury of his interest in the Westminster Terminus Railway. On the faith of these representations, and on the faith that the Westminster Terminus line would on the passing of the then pending bill be effectually proceeded with, the deponent consented to that stipulation. In pursuance of the agreement of the 1st of August, 1855, the deponent did on the 31st of July, 1855, pay to Messrs. Mayhew & Salmon under the written order of Haddan 750*l.*, making with the 750*l.* previously paid the sum of 1500*l.* The deponent also paid to the London and County Bank the sum of 10,912*l.* 10*s.*, which had been advanced by the bank to Haddan or others who had been interested in the said bill; and a deed of grant, dated the 12th of August, 1855, was executed between the several persons whose respective names and seals were

thereunto subscribed and affixed of the first part, Haddan of the second part, the deponent of the third part, and Alfred Wildy and Robert Charles Brown of the fourth part, whereby the scrip, shares, right, and interest of the parties thereto of the first part, who were therein represented as being the subscribers to the undertaking, were transferred to the deponent. The deponent has since learnt that the said parties to the said deed of grant of the first part, so far from having, as was in the said deed of grant *represented, subscribed anything towards [*693 the said undertaking, were in fact merely nominal subscribers, and had no real interest whatever therein. In the course of the autumn of 1855, the deponent became aware that the Westminster Terminus Railway Company were not taking any measures towards the commencement of the construction of their railway, although their compulsory powers for the most important portion of their line had nearly expired. In the month of November in the same year the deponent's attention was drawn to a notice inserted in the newspapers of the intended application to parliament of the Westminster Terminus Railway Company for the amendment of their act of incorporation and the deviation of the line thereby authorized; and the deponent subsequently learned that it appeared by the bill when deposited that the proposed deviation consisted in an abandonment of the terminus at Victoria Street and of the whole of the authorized line between that terminus and a point where the railway was intended to cross the ditch forming the boundary between the parishes of Battersea and Clapham, and that it was also intended to abandon the authorized branch from the authorized main line into the Crystal Palace Railway, and that it was proposed to substitute for this, first, a line of railway commencing at Lupus Street in Westminster and terminating by a junction with the Crystal Palace Railway at Stewart's Lane (in Battersea), secondly, a branch from the junction at Stewart's Lane terminating in a junction with the remains of the authorized line at the above-mentioned parish boundary. The bill further proposed to authorize the return to the company of nearly one-half of their parliamentary deposit. Shortly after the bill was deposited, the deponent learned that the real object *of the Westminster Terminus Rail- [*694 way Company in making this application to parliament, was, practically, to secure themselves from the loss of at all events one-half of their parliamentary deposit, that they entertained no hope of making the authorized line, and that the death of one of their principal supporters and the withdrawal of the promised support of the Brighton Railway Company had been fatal to their scheme. The deponent found, therefore, that, if he successfully opposed the passing of the bill, no railway whatever would be made from Westminster to Clapham; and that, if he failed in his opposition, and the bill passed into a law, the line of which he was proprietor, would, instead of being an extension of the Westminster Terminus Railway, be in effect a loop of the Crystal Palace Railway, and completely in the power of that company, and would terminate at a station very inferior in point of position to that authorized by the act of 1854. The deponent was nevertheless advised that it would be desirable that he should oppose the passing of the bill, in order that, should parliament sanction the measure, he might not be deemed to have been an assenting party to the abandonment of a railway on the construction of which the whole success of his extension railway de-

pended. The deponent prepared, therefore, to oppose the bill, and presented a petition against it to the House of Commons. On the committee, however, the company, instead of asking for the powers contained in their bill, sought power not only to abandon the portion of their authorized railway, which their bill as deposited sought to abandon, but to construct no more in lieu thereof than a short piece of railway commencing at Stewart's Lane and ending at the aforesaid parish boundary, —thus making the deponent's railway simply a loop of the Crystal Palace Railway, without any means of access *whatever to Westminster. They further sought a return of nearly nine-tenths of their parliamentary deposit. The grounds on which their application was made, were, the utter hopelessness of the construction their authorized line, arising from no fault of their own, and the fact that the simple result of parliament holding them to their undertaking would be the absolute loss of their large parliamentary deposit. The bill passed. In the next session the deponent caused application to be made for and obtained an act authorizing the abandonment of the extension line, on the ground, as set forth in the preamble to that act, that the character of the undertaking was so greatly changed as to render the making of such extension inexpedient. Haddan opposed the passing of the bill without success, but obtained the insertion of a clause as follows:— "Nothing in this act contained shall interfere with or prejudicially affect the rights of John Coope Haddan under an agreement bearing date the 1st day of August, 1855, and made between William Roupell, Esq., of the one part, and the said John Coope Haddan of the other part; but such agreement and everything therein contained shall be of the same force and effect as if this act had not passed." From the time of the abandonment of the undertaking authorized by the Westminster Terminus Railway Act, 1854, the deponent considered that any liability on his part to make the extension line was at an end, and that Haddan, having no longer any interest in his doing so, could have no claim to damages under the agreement, the true intent and meaning thereof being, as the deponent conceived, that if through any neglect of his to make the extension the Westminster Terminus Railway should fail to be constructed, and his interests therein be thereby injuriously affected, the deponent should make compensation to him, and that, for the *purpose of facilitating the recovery by him of such compensation, the damages should be considered as liquidated at 5000*l*. Haddan, in his negotiations with the deponent, suppressed and concealed from him certain facts which in fairness he ought to have made known to him, and which if the deponent had known them would have prevented him from entering into the arrangements before alluded to with Haddan, inasmuch as he knew at the time of his negotiating with the deponent, as appeared from a statement made by him in a bill in Chancery in a suit in which he (Haddan) was plaintiff, that he knew at the time that the original Westminster Terminus Railway was about to be abandoned for want of funds.

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It appeared from the other affidavit that Haddan had assigned his interest in the agreement of the 1st of August, 1855, to one Clapham; and that, on the 29th of July, 1860, Mr. Roupell was served with the following notice:—

"In pursuance of the articles of agreement of 1st August, 1855,

between you and the undersigned J. C. Haddan, *we the undersigned John Coope Haddan and Thomas Clapham hereby severally nominate* John Bethell, of, &c., as the arbitrator on behalf of the said John Coope Haddan; and *we* request you within fourteen days from the date hereof to name an arbitrator on your behalf, *in writing, addressed to Messrs. Freshfield & Newman*, 5 Bank Buildings, London. Dated this 28th day of July, 1860. "J. C. HADDAN,
"THOMAS CLAPHAM."

Mr. Roupell, having declined to comply with the above notice, was on the 13th of August, 1860, served with a second notice, as follows:—

"In pursuance of the articles of agreement of 1st August, 1855, made between you and the undersigned *J. C. Haddan, *we the undersigned John Coope Haddan and Thomas Clapham hereby severally* [*697 *nominate* Sir Charles Fox, of, &c., civil engineer, as an arbitrator to act with John Bethell, *the arbitrator already appointed by us.* Dated this 13th of August, 1860. "J. C. HADDAN,
"THOMAS CLAPHAM."

Mr. Roupell never received notice of any other appointments of the said arbitrators than those above set forth; nor was there any other appointment of arbitrators by Haddan than the above. On the 17th of August, Mr. Roupell received notice that the two arbitrators would meet on 22d of August at No. 7, Great George Street, Westminster, to proceed, and that, in the absence of either party, it was their intention to proceed ex parte. On the 21st of August, the solicitors for Mr. Roupell addressed the following letter to Messrs. Freshfield & Newman, the attorneys for Haddan and Clapham:—

"Dear Sirs,—Although we intend to be present to-morrow at the meeting of which we have received notice of the arbitrators alleged to have been appointed under the agreement between Mr. Haddan and Mr. Roupell, of the 1st of August, 1855, we think it right to give you formal notice that we shall only be present in order to watch the proceedings on Mr. Roupell's part, and that neither Sir Charles Fox nor Mr. Bethell is, as we are advised, properly appointed an arbitrator. The appointments purport to be made by Mr. Haddan and a Mr. Thomas Clapham, who from the notices we have received appears to have been, but we believe is not now, an encumbrancer on Mr. Haddan's supposed claim under the agreement. As you may not be aware of the fact, we think it right to inform you that we have notice of several other encumbrancers upon *Mr. Haddan's supposed claim; and we object to [*698 any arbitration at all without those encumbrancers being also parties to it. At all events, we protest, that, if the other encumbrancers have nothing to do with the matter, neither has Mr. Clapham, and that, in either view of the case, the appointments which have already taken place are void. We also protest against the arbitration, even if the arbitrators were regularly appointed,—the act of 1856 having rendered it impossible that Mr. Roupell could make the railway mentioned in the 7th article of the agreement, within the meaning of that article, and further because Mr. Haddan has sustained no damage whatever by its not being made. For these reasons, and others, we protest against your proceeding with the attempted arbitration."

At the meeting of the 22d of August, the arbitrators at first objected

to the attendance of counsel on the part of Mr. Roupell, unless the protest were withdrawn; but the objection was not persevered in, and the claimant's case was gone into: and, on the 5th of September, the arbitrators made their award, as before stated.

H. Lloyd, on a subsequent day, obtained a rule on the part of Haddan calling upon Mr. Roupell to show cause on the first day of the present term why he should not forthwith pay to Haddan the several sums of 5000*l.*, and 49*l.* 6*s.* 3*d.* for interest thereon, together with the sum of 74*l.* 11*s.* 2*d.* for costs, amounting in the whole to 5123*l.* 17*s.* 5*d.*

Lush, Q. C., and *H. Lloyd*, showed cause against *Bovill's* rule.—The first ground of objection urged against the award is, that Clapham interfered in the appointment of Messrs. Bethell and Fox, and in the *699] *request to Mr. Roupell to appoint an arbitrator. There clearly is nothing in that objection. The appointment of the arbitrators is not less an appointment by Haddan, because Clapham also professes to appoint. Suppose Haddan and Clapham had signed two separate documents each appointing the arbitrators, would Clapham's appointment have vitiated Haddan's? What difference, then, can it make that the two severally appoint by one document? There could be no objection to Clapham's joining as an assenting party. The next objection is, that the appointment of the arbitrators did not state the matters to be arbitrated upon. There was but one matter in dispute between the parties, viz., whether or not Haddan was entitled under the agreement of the 1st of August, 1855, to receive from Roupell 5000*l.* The 8th article of that agreement provides, that, "in every case of any difference between the parties touching the true intent or construction of this agreement, or of anything therein expressed, or touching anything to be done or omitted in pursuance of this agreement, or as to any of the incidents or consequences thereof, or otherwise relating to the premises, the matter in question shall be referred to arbitration." Not a word is said in the agreement as to the appointment of the arbitrators containing any statement of the matter to be arbitrated upon: nor was it ever suggested in the correspondence between the parties, or before the arbitrators, that such an intimation was necessary, or that Mr. Roupell and his solicitors did not perfectly well know the nature and extent of Haddan's claim. The third objection is, that the request to Mr. Roupell to appoint an arbitrator "in writing addressed to Messrs. Freshfield & Newman," was not in accordance with the agreement. This is a most preposterous and unjustifiable objection. The parties throughout *700] *were corresponding through their attorneys; each puts his attorneys in his place. The merits of Haddan's claim are entirely out of the question. The arbitrators were at liberty to put their own construction upon the agreement; and, right or wrong, their decision was binding. Besides, if it were necessary to go into the merits, the fact of his rights under the agreement being specially reserved to him by the act obtained to authorize Roupell to abandon the proposed railway, would be strong to show that the merits were with Mr. Haddan.

Bovill, Q. C., and *Quain*, in support of the rule.—Mr. Roupell was induced by a gross and scandalous fraud to enter into the agreement in question. Haddan put himself forward as the representative of persons who had no real interest in the projected line of railway through

Mr. Roupell's property; and Mr. Roupell, believing the transaction to be bonâ fide, consented to become a party to it. And now it appears from Haddan's own admission in a bill in Chancery filed by him in another matter, that he was fully aware at the time that the Westminster Terminus Railway was about to be abandoned for want of funds. The non-completion of the extension line, therefore, could not prejudice any interest of Haddan, and consequently his claim on Mr. Roupell under the agreement of the 1st of August, 1855, was altogether gone. The arbitrators should have raised the question as to the construction of the agreement on the face of their award. [ERLE, C. J.—Mr. Roupell was not before them to suggest that course.] He feared that his appearance before the arbitrators would be construed into an acquiescence in the agreement. So much as to the merits. Then, as to the formal objections to the proceedings of the arbitrators. Clapham had no right to *interfere in the appointment of the arbitrators. It does not [*701 appear that he had any interest, as trustee or otherwise, in the subject-matter of the reference: and, if Mr. Roupell had acted upon the joint notice and request, he might have been precluded from afterwards denying Clapham's right. Then, the appointment of the arbitrators should have contained an intimation of the matter or matters to be arbitrated upon. The 8th article of the agreement authorizes a reference to arbitration, not of the whole agreement, but of "the matter in question." This objection, no doubt, is strictissimi juris: but, under the circumstances, Mr. Roupell conceives that he is justified in defending himself by any means against the fraud which has been practised upon him. The remaining objection is, that the request,—a joint request by Haddan and Clapham,—to Mr. Roupell to appoint an arbitrator, is not in accordance with the agreement, inasmuch as it requires him to address the appointment to Messrs. Freshfield & Newman. By complying with that requirement, Mr. Roupell might have been fixed to deal with parties under the reference who are no parties to the agreement.

Then, as to the cross rule,—If the rule to set aside the award is discharged, the rule for payment of the money cannot be made absolute, but the court will leave Mr. Haddan to his remedy by action upon the award. [ERLE, C. J.—I am at a loss to see how you could raise these questions by pleading to an action on the award.] If that course is not open to the defendant, there is the greater necessity for setting aside the award.

ERLE, C. J.—In this case an agreement was entered into between Haddan and Roupell under which the latter was in a given event to pay the former *5000*l*. The agreement contained a great number of [*702 stipulations, and, amongst others, a clause (article 8) providing, that, "In every case of any difference between the parties thereto, or their respective representatives, whether touching the true intent or construction of that agreement, or of anything therein expressed, or touching anything to be done or omitted in pursuance of that agreement, or as to any of the incidents or consequences thereof, or otherwise relating to the premises, the matter in question should be referred to arbitration;" and a clause (9) providing that "every such reference should be made to two persons, one to be named by each party;" and another clause (10) providing, that, "if either party for fourteen days after being requested by the other party to name an arbitrator fail so to do,

then both arbitrators may be named by the party making such request." Differences did arise between the parties, and Mr. Bethell was appointed arbitrator by Mr. Haddan, and subsequently, upon Mr. Roupell declining to appoint one, a second arbitrator, viz., Sir Charles Fox, was appointed by Mr. Haddan: and, the arbitrators, having met and heard such evidence as was brought before them, made an award in favour of Mr. Haddan. A rule has been obtained on the part of Mr. Roupell to set aside the award upon three grounds. The first ground is, "that Clapham interfered in the appointment of Messrs. Bethell and Fox, and in the request to Mr. Roupell to appoint an arbitrator." It appears from the affidavits that one Clapham joined with Haddan in making the nomination of the arbitrators, each acting severally for himself. Clapham might have been a party beneficially interested in the result. If the appointment had been the joint act of the two, I should have been inclined to hold that the objection ought to prevail: but, as each pro-
*703] fesses to act severally for himself, I *think the utile is not vitiated by the inutile, and that the appointment was sufficiently made; for, as was well put by Mr. *Llayd*, suppose the two had signed each a paper severally appointing an arbitrator, the fact of Clapham assuming to make an appointment would not destroy the efficacy of the appointment by Haddan. For these reasons, I think the appointment of the arbitrators by Haddan was not vitiated by the addition thereto of the name of Clapham. The second objection is, "that the appointment of the arbitrators did not state the matters that were to be arbitrated upon." I am of opinion that there is no foundation for that objection. The agreement in question was both an agreement for several sums of money to be paid and several things to be performed by Mr. Roupell, and a submission to arbitration of all matters in difference,—of all matters in difference which might arise, by anticipation. It is true that the effect might be to submit a point of law to the decision of a layman. But the parties have by their agreement chosen to withdraw the matters from the ordinary tribunals of the country, and to consign them to the domestic forum of an arbitrator. In the appointment of an arbitrator there is no necessity to state the particular matters he is to be called upon to decide. He is appointed to act as arbitrator in all matters in difference that may be brought before him. There is nothing in the agreement or in the general principles which govern these matters to warrant this objection. The third and last objection is, "that the request to Mr. Roupell to appoint an arbitrator in writing addressed to Messrs. Freshfield & Newman, was not in accordance with the agreement,"—that is, that the request by Haddan to Roupell was a void request, because it called upon him to notify the appointment of the arbitrator to
*704] Messrs. Freshfield & *Newman, the solicitors of Haddan, and not to Haddan himself. It appears to me that the answer given to that objection on the part of Haddan is a satisfactory one. If Mr. Roupell declined to hold any communication on the subject with Messrs. Freshfield & Newman, he might have said so. It is the ordinary course in all civil proceedings for the parties to put forward solicitors to act for them. It appears here that at an early period Haddan communicated to Roupell that Messrs. Freshfield & Newman were his solicitors, and that Mr. Roupell in like manner intimated that Messrs. Whitaker & Woolbert would act for him; and these gentlemen appear to have com-

municated with each other throughout the business. It was never suggested that the agreement did not authorize the course that was pursued: and I see nothing in the agreement against it: at all events, it is too late to raise the objection after the award has been made. I do not say that Mr. Roupell was estopped from urging this point by appearing as he did before the arbitrators. But, if he meant to object to the intervention of Messrs. Freshfield & Newman, he should have said so. The grounds of objection stated in the rule having therefore all failed, the rule must be discharged.

In the discussion of this rule, we have listened to many matters which are wholly irrelevant. But, after the most careful attention to the whole case, I feel bound to say that the parties have selected their own forum, and must abide the result. If, instead of going to a reference, Haddan had chosen to bring an action to recover the 5000*l.* under the agreement, he might have been met by an objection on the part of Roupell that the mode of settling differences was specifically provided for by the agreement itself. Haddan having in accordance with the agreement named *an arbitrator on his part, Roupell refused to name one on his part. Haddan thereupon appointed the second arbitrator; and the whole matter was gone into and disposed of. I think we should be throwing unwarrantable doubt upon arbitrations in general if we gave way to the objections urged against our making the second rule absolute. In considering this matter, I feel bound to exclude from my mind all extraneous considerations. The proper course for Mr. Roupell to pursue would have been to name an arbitrator, and ask to have the points of law reserved for the court. He has not thought fit to do so. He must stand or fall by the advice he has acted upon. He has subjected himself to the obligations (at law, at least) of a valid award. Here, we cannot look at the merits. The rule to set aside the award must be discharged with costs: and the cross-rule must be made absolute, but, under the circumstances, without costs. [*705

The rest of the court concurring, Rules accordingly.

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*PRATT *v.* GOSWELL. *Nov.* 2. [*706

The court will not grant a rule for the inspection of documents which were produced in evidence at the trial, for the mere purpose of furnishing materials to the other side for moving for a new trial.

The plaintiff, a builder's piece-master, was employed to do certain carpenter's and joiner's work to certain houses for the defendant, for a given sum. Before the whole work was completed, the defendant discharged the plaintiff, who thereupon sued him for an alleged balance of 178*l.* 7*s.* 7*d.* for work and labour and money paid: and he also filed an affidavit in bankruptcy in which he alleged that the defendant was indebted to him in that sum for work and labour and money paid. At the trial, the jury found a verdict for the plaintiff for 100*l.* only:—Held, that the defendant was entitled to costs under the 12 & 13 Vict. c. 106, s. 86,—there being no reasonable or probable cause for swearing to that as a debt, which, as to a part at least, was only a claim for unliquidated damages.

THIS was an action brought by the plaintiff, a builder's piece-master, to recover a balance of 178*l.* 7*s.* 7*d.* alleged to be due to him from the defendant for carpenters' and joiners' work done for the plaintiff to certain houses at Colney Hatch.

The cause was tried before Willes, J., at the sittings at Westminster after last term, when a verdict was found for the plaintiff, damages 100*l.*

J. Brown, on the first day of this term, moved for a rule calling upon the plaintiff to show cause why he should not produce for the defendant's inspection certain documents which were given in evidence at the trial, in order to enable the defendant to frame his affidavits in support of an intended motion for a new trial. The affidavit upon which the application was founded, stated that the plaintiff was the defendant's foreman of carpenters from the month of March, 1857, until the 2d of June, 1860, when he discharged him; that the defendant paid the wages of his journeymen carpenters through the plaintiff as his foreman every Saturday afternoon; that such wages were entered upon certain "tally-boards" brought to the defendant by the plaintiff every Saturday afternoon, and such boards were given to the plaintiff, who distributed such wages among the carpenters in the defendant's employ according to the amount appearing opposite their names on such boards, and that such "tally-boards" were then in the plaintiff's possession or power; that, on the trial of the cause, the plaintiff produced four or five such "tally-boards" only, but he had still, as the deponent believed, the whole of
*707] such *boards in his possession; that at the trial the plaintiff also produced two account books, containing entries of moneys alleged to have been paid on account of the works performed by the plaintiff for the defendant, but the deponent averred that all the moneys paid by him to the plaintiff were on account of his wages paid through the plaintiff as his foreman as aforesaid, and that such books were materially necessary to be inspected by the defendant; that, on the said trial, the plaintiff produced as evidence an alleged contract dated in or about August, 1858, for doing certain work at fourteen villas and four shops at Colney Hatch belonging to the defendant: and which alleged contract was signed by the plaintiff only, and not by the defendant; that the plaintiff averred that such contract had been produced to the defendant previously to the commencement of the said works, and related thereto, and that he had performed the works mentioned therein; that such contract was never until produced at the trial shown to or seen by the defendant, nor had he any knowledge of the same, and that it was material and necessary that the defendant should inspect and take a copy of such alleged contract; that the said "tally-boards," books, and contract were materially necessary for the deponent's defence to the action, and that he had no copies thereof, nor until they were produced by the plaintiff did the defendant know of their being material to the cause; that the deponent had been advised that the inspection of the "tally-boards," books, and contract was necessary to enable him to obtain affidavits from the workmen whose names were on the said boards, and others, in support of the motion for a new trial, and to contradict the alleged contract, and explain the entries in the books; and that inspection had been demanded and refused.

*708] *The 46th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, provides, that, "upon the hearing of any motion or summons, it shall be lawful for the court or judge, at their or his discretion, and upon such terms as they or he shall think reasonable, from time to time to order such documents as they or he may think fit to be produced, and such witnesses as they or he may think necessary to appear and be examined vivâ voce, either before such court or judge,

or before the master, and, upon hearing such evidence, or reading the report of such master, to make such rule or order as may be just." If that section does not authorize the court to do as prayed, it has power by virtue of its common law jurisdiction to do so. In Hewitt *v.* Pigott, 7 Bingh. 400 (E. C. L. R. vol. 20), 5 M. & P. 252, this court allowed the plaintiff to have inspection of a deed which had been read in evidence by the defendant on a first trial. [ERLE, C. J.—There, a rule had been made absolute for a new trial. The case therefore does not help you. Every document produced in evidence may be held by the court until the cause is finally disposed of. Do you say that every one who has lost a verdict has a right to come with a preliminary motion like this before he applies for a new trial? If you put it on the ground that you are in a position to show the court that you have probable ground for a new trial, why not move at once for a new trial?] A party has a right during the progress of the cause to see all the documents which were produced by his opponent at the trial. How long does that right last? Jervis, C. J., on one occasion suggested that the right existed until the postea was delivered out; otherwise it would be necessary for the judge to take every document on his notes. [ERLE, C. J. —The parties have no right of access to those notes.] In Tebbutt *v.* Ambler, 7 Dowl. P. C. 674, it was held by *Coleridge, J., that, where a defendant makes an affidavit at a judge's Chambers, [*709 identifying a document which is exhibited to him only, and not filed, he is compellable to allow the plaintiff to take a copy of that document, although it is sworn to furnish a defence to the action. [ERLE, C. J.— That proceeded on the ground that an exhibit is as much a part of the affidavit as if the document had been (as was formerly the practice) annexed to it.] So, in Attenborough *v.* Clark, 2 Hurlst. & N. 588,† it was held that documents referred to in affidavits, and exhibited, must be handed in with the affidavits, and remain in court until the matter in respect of which the affidavits are sworn has been disposed of.

ERLE, C. J.—I am of opinion that the ground of this motion fails. Mr. *Brown* claims a right on the part of the defendant, ex debito justitiæ, to have an inspection of certain documents which were produced in evidence by the plaintiff on the trial of the cause, in order to enable the defendant to put himself in a position to move for a new trial. I am of opinion that a party has no absolute and unqualified right to demand an inspection of all documents which were produced in evidence by his opponent. If the defendant had qualified himself to move for a new trial on any of the ordinary grounds upon which the court is in the habit of granting rules, we should take care that justice should not be defeated by the withholding of any documents which were material to enable the court to arrive at a proper conclusion. But I am not aware of any precedent for this application; and I am unwilling to establish a practice which as it seems to me would be fraught with inconvenience. The cases to which our attention has been called do not in my judgment support the application. In *Hewitt *v.* Pigott, a rule for [*710 a new trial had been granted: and in Tebbutt *v.* Ambler and Attenborough *v.* Clark the documents were virtually embodied in affidavits already on the files of the court. Documents produced in evidence may be considered to be in court until the trial is over; but not after.

WILLIAMS, J.—I am of the same opinion. I am far from saying that the court has not power to order the production of documents given in evidence, where the purposes of justice require it. But the question here is, whether one party to a suit has a right, whether the purposes of justice demand it or not, to insist upon having an inspection of all documents which have been offered in evidence by his opponent. No such right is shown to have ever been exercised, and I am equally unwilling with my Lord to make a precedent for it.

WILLES, J.—I am of the same opinion. As to the case before Jervis, C. J., I think it is extremely likely that we should find, if all the circumstances were before us, that there was a point reserved. At all events, the utmost it shows, is, that that learned judge, in his discretion, thought it right to order the inspection in that case. Here, in the exercise of our discretion, I think we ought not to do so. If we were to encourage applications of this sort, it would afford a ready pretext for delay in many cases.

KEATING, J., concurred. Rule refused.

Jan. 29. *Manisty*, Q. C., on a subsequent day, moved for a new *711] trial on the ground of surprise and that the verdict *was against the weight of evidence, and also for a rule calling upon the plaintiff to show cause why the defendant should not be allowed his costs of the action and of the application, and why the plaintiff should not be disabled from taking out execution for the sum recovered in the action, unless the same should exceed (and then only for such excess) the amount of the defendant's said costs when taxed; and why, in case the sum recovered by the plaintiff should be less than the defendant's costs, the defendant should not be at liberty to issue execution for the difference,—under the 86th section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106,(*a*) on the ground that the plaintiff had with- *712] out reasonable or probable *cause made an affidavit in the court of bankruptcy that the defendant was indebted to him in the sum of 178*l.* 7*s.* 7*d.* for work and labour done and performed by him for the defendant and for money paid by him for the defendant at his request, whereas at the trial he had only recovered 100*l.* [WILLES, J.—

(*a*) Which enacts, "that, in every action brought after the commencement of this act, wherein any such creditor is plaintiff and any such trader is defendant, and wherein the plaintiff shall not recover the full amount of the sum for which he shall have filed an affidavit of debt as aforesaid (s. 78), such defendant shall be entitled to costs of suit, to be taxed according to the custom of the court in which such action shall have been brought, provided that it shall be made appear to the satisfaction of the court in which such action is brought, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff in such action had not any reasonable or probable cause for making such affidavit of debt in such amount as aforesaid, and provided such court shall thereupon, by rule or order, direct that such costs shall be allowed to the defendant; and the plaintiff shall, upon such rule or order being made, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed (and then in such sum only as the same shall exceed) the amount of the taxed costs of the defendant in such action; and, in case the sum recovered in any such action shall be less than the amount of the costs to be taxed as aforesaid of the defendant, then the defendant shall be entitled, after deducting the sum of money recovered by the plaintiff in such action from the amount of his costs so to be taxed, to take out execution for such costs, in like manner as a defendant may now by law have execution for costs in other cases."

See Deere v. Kirkhouse, 20 Law J., Q. B. 195, 1 Pr. Rep. 783.

The plaintiff made his claim on the footing that all the houses were finished, when a considerable portion of work remained to be done upon them.]

The court refused to grant a rule for a new trial, there being evidence both ways, and the judge who tried the cause not being dissatisfied with the result: but they granted a rule to deprive the plaintiff of costs,—intimating at the same time that the two motions could not properly be combined in one rule.

Digby Seymour showed cause, upon affidavits stating, amongst other things, that the plaintiff had been improperly prevented by the defendant from completing the work, a small portion only of which remained to be done; and that the verdict of the jury was influenced by the false statement of the defendant at the trial that the completion of the unfinished portion cost him 100*l.* If the plaintiff was improperly prevented by the defendant from fulfilling the contract on his part, there is no reason why he should not be paid the full contract price. [ERLE, C. J.—Not as liquidated damages for work done.] No doubt, where part of the plaintiff's claim is barred by the statute of limitations, he would *be liable to costs under this statute if he included the whole in his affidavit: Hill *v.* Merritt, 26 Law J., Exch. 126. So, [*713 if he omits to deduct a known set-off: Smith *v.* Temperley, 16 M. & W. 273,† 4 Dowl. & L. 510; Marshall *v.* Sharland, 15 Q. B. 1051 (E. C. L. R. vol. 69). Here, there was no set-off; nor was there anything to show that the plaintiff might not fairly and reasonably consider himself entitled to the full sum he claimed. In Gilbert *v.* Crosier, 1 C. B. N. S. 632 (E. C. L. R. vol. 87), the plaintiff made an affidavit in bankruptcy alleging the defendant to be indebted to him in the sum of 63*l.* 6*s.* At the trial, the jury returned a verdict for the plaintiff for 10*l.* in addition to 37*l.* 10*s.* paid into court on a plea of tender: and, the judge who tried the cause reporting that he was of opinion there was evidence to show that the plaintiff was fairly entitled to recover the whole amount, it was held not to be a case for costs under the 12 & 13 Vict. c. 106, s. 86. Cockburn, C. J., there says that "the verdict is not conclusive on the court, especially where the question in dispute is the value of work done." In Marshall *v.* Sharland, Lord Campbell says that the reasonable decisions on the statute 43 G. 3, c. 46, s. 3, are clearly importable into these cases: and in Stovin *v.* Taylor, 1 Dowl. P. C. 697, it was held, that, where there is reasonable doubt in law as to the right of the plaintiff to recover part of his demand, the defendant is not entitled to claim the benefit of the 43 G. 3, c. 46, s. 3.

Manisty was not called upon to support his rule.

ERLE, C. J.—I am of opinion that this rule must be made absolute. The plaintiff filed an affidavit in the Court of Bankruptcy, in which he swore that the defendant was indebted to him in the sum of 178*l.* 7*s.* 7*d.* for work and labour and money paid; and on the *trial of the [*714 cause the plaintiff recovered a verdict for 100*l.* only. The question is whether the plaintiff had reasonable or probable cause for making such affidavit of debt for such amount. I agree that the verdict of the jury is not conclusive, but that the court is at liberty to inquire into the whole matter: we have accordingly conferred with the learned judge who presided at the trial. It appears that the substance of the plaintiff's case was this:—He is what is called a builder's piece-master, and

by the terms of his contract with the defendant was to be paid for the work done at so much per house. If the whole of the houses had been completed under the contract, the plaintiff would have been entitled to receive from the defendant 178*l.* 7*s.* 7*d.*: but, before the work was completed, the defendant dismissed the plaintiff, who thereupon thought fit to take the law into his own hands, and file an affidavit alleging the whole amount to be a debt due to him. There is often very good reason for preventing a party from completing work according to contract. I think the plaintiff had no right to call the unliquidated damages he might be entitled to recover against the defendant for preventing him from completing the work, a debt for work done. I therefore think he had no reasonable or probable cause for making the affidavit and so seeking to compel the defendant to give bond for the whole amount.

The rest of the court concurring, Rule absolute.

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*715] *Ex parte MACKARINAH FISH. *Jan.* 15.

Upon a motion under the 3 & 4 W. 4, c. 74, s. 91, to dispense with the concurrence of the husband in a conveyance of the wife's separate interest in certain property, the court, in addition to an affidavit that the parties were living apart by mutual consent, and that the husband had been applied to but had refused to execute the conveyance, required an affidavit negativing the wife's receipt of any allowance from her husband.

F. ELLIS moved for an order under the 3 & 4 W. 4, c. 74, s. 91, to dispense with the concurrence of the husband of Mrs. Fish in a deed conveying certain property to which she was separately entitled under the will of one Elizabeth Brookes. The affidavit upon which the motion was founded stated that the parties had since the year 1857 been living apart by mutual consent, and that the husband had been applied to for his concurrence in the conveyance, but had refused to give it. [WILLES, J.—Does the affidavit negative the receipt by the wife of any allowance from her husband?] It is submitted that that is not necessary where the parties are living apart by mutual consent.

ERLE, C. J.—It does not occur to me to be reasonable that there should be that distinction. You had better procure an affidavit from the lady as to whether or not she has received any allowance from her husband, and mention the matter again.

The affidavit was amended and re-sworn; the following statement being introduced therein,—"that, since we have been living apart, my said husband not contributed, nor does he in any manner or to any extent whatever contribute, to my maintenance or support; and that no settlement was executed in favour of me upon our said marriage or at any other time." Fiat.(*a*)

(*a*) In re Sarah Woodcock, 1 C. B. 437, and In re Isabella Grierson Perrin, 14 C. B. 420 (E. C. L. R. vol. 78), were both cases identical with the case in the text, and neither Tindal, C. J., nor Jervis, C. J., thought it necessary for the affidavit to negative any allowance from the husband.

*DANIEL *v.* BOND and Another. *Jan.* 15. [*716

In an action by a consignee of goods against shipowners for damage sustained in consequence of the unseaworthiness of the ship, the court made an order, under the 50th section of the Common Law Procedure Act, 1854, for the plaintiff to inspect and take copies of certain surveys made on the ship in a foreign port, a general average statement, the shipwright's bill for the repairs done to the ship, the captain's protest, and the log-book,—as being documents proximately connected with the matter in issue.

Semble, that, since the statute, there is no difference in this respect between the case of an action between the owners and underwriters and any other persons.

THIS was an action by the plaintiff as consignee of certain sugars shipped at Barbadoes on board the Tropic, against the defendants as the owners of the ship, the complaint in substance being that the ship was unseaworthy, in consequence of which part of the sugars were damaged and were sold at Barbadoes, and the residue brought home subject to a claim for contribution to general average.

Upon a summons taken out under the 50th section of the Common Law Procedure Act, 1854, the defendants' attorneys admitted that they had in their possession the following documents:—

"1. Survey on the ship Tropic at Barbadoes, signed by J. T. Head and others, dated 8d April, 1858.

"2. Further survey on ship, dated 8th April, 1858.

"3. Further survey on ship, dated 12th April, 1858.

"4. Further survey on ship, dated 26th April, 1858.

"5. General average statement.

"6. Vouchers therein referred to, numbered 1 to 25 inclusive,—among them one (numbered 5) being the bill of the shipwright, Grant, for repairs to the ship, the whole amount of which was by the average statement charged as particular average on the ship.

"7. Protest, dated the 8d of May, 1858.

"8. Log-book of the Tropic."

The defendants' attorneys offered to produce all these documents except the shipwright's bill and protest; but the plaintiff insisted upon his right to inspect the whole of them under the 50th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, which enacts, that, "upon the application of either party to any cause or other civil proceeding in *any of the superior courts, upon an affidavit by [*717
such party of his belief that any document to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the court or judge to order that the party against whom such application is made, or, if such party is a body corporate, that some officer to be named by such body corporate, shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and, if so, on what grounds) to the production of such as are in his or their possession or power; and, upon such affidavit being made, the court or judge may make such further order thereon as shall be just." The matter having been refered to the court,

F. M. White, on behalf of the plaintiff, moved for a rule calling upon the defendants to show cause why the plaintiff should not be at liberty

to inspect and take copies of the several documents admitted by the defendants' attorneys to be in their possession, and why the defendants should not produce the said documents on the trial of this cause or at any examination of the plaintiffs' witnesses in England. He submitted that the 50th section of the Common Law Procedure Act, 1854, gave the court a wider jurisdiction than it possessed under the former statute.(a)

*718] [WILLES, J.—*The question is whether a consignor or consignee suing the owner has the same rights in this respect that underwriters enjoyed before the statute. All the documents are documents which though not strictly evidence per se may become evidence.]

Watkin Williams showed cause in the first instance.—The power of the court to order the production of documents rests upon the three several foundations,—1. Their common law jurisdiction, as it is called,—2. The 6th section of the Evidence Act,—3. Under the 50th section of the Common Law Procedure Act, 1854. In Wigram on Discovery, 2d edit., p. 207, § 292, it is said that "the general principles upon which the right of a plaintiff to the production of documents in the defendant's possession depends, and by which it is bounded, are those that resolve themselves into the two rules which in a former page (p. 14) were described as the cardinal rules in the law of discovery,—first, the right, saving just exceptions, of every plaintiff to a discovery of the evidences which relate to *his* case,—and, secondly, the privilege of every defendant to withhold a discovery of the evidences which exclusively relate to his own. And the questions upon motions for the production of documents before the hearing, are, by what tests the court is to determine under which of the two heads, of plaintiff's or defendant's evidences, any given documents fall." And the learned author

*719] goes on to say, *that, "in determining these questions, the first thing to be observed, is, that the onus is upon the plaintiff to prove his right to see the documents the production of which he calls for." To entitle the plaintiff, therefore, to the production of these documents, he must show that they are *evidence:* it is not enough to show that they will lead him into the channels of evidence. The main difficulty here is as to the surveys. These clearly cannot be evidence. They are mere statements, not upon oath, of what the surveyors saw. The Court of Chancery never would order the production and inspection of such documents as these. Again, at p. 165 of Wigram, it is said, that, "in determining whether *particular* discovery is material or not, the court will exercise a discretion in refusing to enforce it, where it is *remote in its bearings* upon the real point in issue, and would be an oppressive inquisition:" and the author cites a MS. case of Dos Santos *v.* Frietas, and also refers to Janson *v.* Solarte, 2 Y. & C. 127,† "as evidencing an unwillingness in the court to sanction an inquisitorial discovery." [WILLIAMS, J.—Have the repairs been done according to

(a) 14 & 15 Vict. c. 99, s. 6, which enacted, that, "whenever any action or other legal proceeding shall henceforth be pending in any of the superior courts, &c., such court and each of the judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which previous to the passing of this act a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity at the instance of the party so making application as aforesaid to the said court or judge."

the surveys?] No doubt the ship has been repaired. [WILLES, J.—The ship-builders' bill would follow on that. These surveys are in the nature of what are called public documents, according to the maritime system. It is probably for that reason that underwriters, at least since Lord Mansfield's time, have been allowed to look at these documents.] The position of underwriters as to the means of acquiring evidence is peculiar, for the reason, no doubt, that they are more liable than any other persons to be deceived. At p 251, Sir James Wigram says: "From the language of some reported judgments, it might be inferred that the judges by whom they were pronounced were of opinion, that, if a document were so stated in an answer in equity that a *court [*720 of law would, in analogous cases, order its production, a court of equity should *therefore* do the same.(a) Assuming that such a principle was intended to be expressed by the dicta referred to in the note, the author presumes to say that it cannot be too strongly objected to. It may, indeed, be questioned whether the jurisdiction exercised by courts of law in compelling the production of documents merely because they are stated in the pleadings, has not been introduced upon the erroneous supposition that they were doing no more in such cases than courts of equity would do in the same case,—an observation, which, if well founded, would make a reference to the practice of courts of law inadmissible for *any* purpose in deciding what a court of equity should do. But, however that may be, it is certain that a court of equity never gives the plaintiff in equity the benefit of the defendant's oath, without giving the defendant the benefit, as far as it may go, of his own oath also.(b) The observation of Lord Eldon in the case of The Princess of Wales *v.* The Earl of Liverpool, and the principle of the Lord Chancellor's (Lord Cottenham) judgment in Brown *v.* Thornton, appear to place this point beyond the reach of controversy. In the former case, Lord Eldon, referring to the practice of courts of law in compelling the production of written instruments, says (1 Swanst. 119): 'Those courts, adopting a special mode of proceeding, have assumed a jurisdiction which was formerly exercised exclusively by courts of equity. They have done so on the supposition that [*721 *they were doing what courts of equity did: but I believe it will be difficult to admit, that, in the exercise of that jurisdiction, they have acted between the parties as this court would act. That, however, is the principle on which they have since proceeded, in compelling, on motion, the production of bills of exchange or promissory notes, the subjects of an action: and I believe Lord Mansfield first adopted that rule on the supposition that he did no more than was constantly done in courts of equity. Speaking with all the deference due to Lord Mansfield, it does not appear to me that he exactly recollected what a court of equity would do in such a case; because there is a mighty difference between simply producing an instrument, and producing it in answer to a bill of discovery, where the defendant has an opportunity of accompanying the production with a statement of everything which is necessary to protect him from its consequences. On the

(a) Referring to Bolton v. The Corporation of Liverpool, 1 Mylne & K. 93; Pilkington v. Himsworth, 1 Y. & C. 617.†

(b) Citing The Princess of Wales v. The Earl of Liverpool, 1 Swanst. 114; Brown v. Thornton, 1 Mylne & Cr. 243; and Evans v. Bicknell, 6 Ves. 181, 185.

present case, we must refer to the practice of this court; and, admitting that there may be exceptions to the rule of practice, we must admit also that great care must be taken in each particular instance that the case of exception actually exists. It becomes, therefore, necessary to consider the case with reference to all our rules for compelling production of instruments, whether instruments mentioned in the bill or in the answer; recollecting what those rules require the plaintiff in the one case and the defendant in the other to admit relative to the possession of the instruments.' And again his Lordship adds (1 Swanst. 124): 'Many doctrines have been introduced into courts of law on a supposed analogy to the practice in equity, but without the guards with which equity surrounds the case; as, in the instance of dispensing with profert, no man can enter this court without guarding his entrance by sanctions *722] which the courts of law *cannot impose: and it happens whimsically enough, that there are cases in which courts of law, proceeding on the principle of giving a remedy because one might be obtained in equity, have compelled the party to resort to equity for protection against that practice at law. When courts of law held, that, because the production of promissory notes might be obtained in equity, they would compel the plaintiff to produce them, they forgot, that, in equity, if the promissory note will not on the face of it furnish explanation, the defendant to the cross-bill accompanies the production with an explanation by his answer of all the circumstances; and that the mere compulsory production would deprive him of the safeguards which this practice affords.' " [ERLE, C. J.—It must be borne in mind that the tendency in those days was to exclude equity from the courts of law; whereas, now the tendency rather is to admit some equity.] In The King *v.* Holland, 4 T. R. 691, where an information was filed by the attorney-general against an officer of the East India Company, on charges of delinquency there, founded upon the report of a board of inquiry in India, it was held that the defendant had no right to have an inspection of that report, nor had the Court of Queen's Bench a discretionary power to grant it. Upon what principle can it be just to allow a plaintiff to inspect documents which he does not profess to say are evidence, but merely that they may possibly put him on the track to discover evidence? [WILLIAMS, J.—They may point to the witnesses who can prove the plaintiff's case, viz., the persons who did the repairs to the ship.]

White was not called upon to support his rule.

ERLE, C, J.—I am of opinion that this rule should be made absolute. *723] The statute has given to the courts *extremely wide powers for directing documents to be produced, limited only by what they shall think just. I am well aware of the indefinite nature of that limitation, and of the danger of too great laxity in the exercise of this power. But I feel bound to say that I think the facts clearly bring this case within the power which the legislature intended us to exercise. The documents in question, though not strictly evidence in themselves, have a proximate tendency to advance the plaintiff's case, and ought I think to be produced. These are not private documents, which a party might well desire not to disclose. The surveys are documents in some degree of a public nature: and the shipwright's bill has nothing of a secret character about it. If these are not strictly evidence, they are

at all events proximately connected with the issue to be tried, and ought to be admissible in evidence. If the ship were surveyed and repairs done to the ship in pursuance of the recommendation contained in the survey, and the owner paid the shipwright's bill, that would go far to fix him with knowledge that the ship was in such a state as to require the repairs mentioned in the survey. Without, therefore, professing to lay down any general rule, I think this case clearly comes within the statute.

WILLIAMS, J., and KEATING, J., concurred.

WILLES, J.—I am glad that the opinion of the court has been taken upon this point, because one is often pressed at Chambers with the distinction between the case of underwriters and that of any other person suing the shipowner. There may be a distinction as to circumstances occuring at or about the time of the contract. That one can understand. But, as to surveys and shipwrights' bills, in the case of a loss, in respect of matters occurring in a foreign port, and dealing with *transactions of a distant period of which the opposite party can have no means of informing himself except by looking at [*724 the documents, I cannot see any just distinction between the position of an underwriter and that of any other person. The general impression, however, has been to the contrary; and therefore I am glad that the question has been raised, and that the opinion of the court is that all suitors have a right to all documents having a proximate bearing upon the case, and affording information in respect of the matters in issue in the cause.

WILLIAMS, J.—I wish to be understood as having intended to express my assent to the construction which my Lord put upon the statute.

Rule absolute.(*a*)

(*a*) In Goldschmidt *v.* Marryat, 1 Camph. 559, which was an action against underwriters upon a policy, it was stated that the defendants had applied to Heath, J., for an order upon the plaintiff to produce upon affidavit all the papers in his possession concerning the cause, but that that learned judge had refused to make any order, except for the production of specific papers mentioned by the defendant, or generally for all papers, without any affidavit. But Sir James Mansfield said: "I have great difficulty in believing this statement to be correct. I have made fifty such orders since I became Chief Justice of this court. I was, to be sure, a good deal surprised when they were first applied for, as nothing of the sort was known when I practised in the King's Bench. But I consulted the other judges, and found they had become extremely common. I think they have been very properly introduced; as they often obviate the necessity of going into a court of equity, and save a great deal of delay, expense, and litigation. Without requiring the plaintiff to produce the papers *on affidavit*, the order would be nugatory. He would only select such as could be of no use to the opposite party. Nor would it answer to limit *the order to such papers as are specifically named; since [*725 there may be others which the party has not the means of describing, and which may be got at through the medium of a court of equity. I cannot believe, therefore, that my Brother Heath refused to make an order on the plaintiff to produce upon oath all papers in his possession concerning the cause now at issue."

In Twisell *v.* Allen, 5 M. & W. 337,† Maule, B., seems to think that the practice of requiring the production of documents in the case of underwriters resulted from the consolidation rule. That was an action by a shipowner against the owner of goods, for their proportion of a general average loss: and the Court of Exchequer refused to make an order for the defendants to inspect and take copies "of the protest, the account of expenses incurred which constituted the sums sought to be made the subject of general average, and other usual documents in which the general average was claimed." Wightman, for the defendants, suggested that they were "very much in the situation of underwriters; they cannot know, any more than they, what occurred on board the ship: everything is in the hands of the plaintiff." To which Maule, B., answers,—"Underwriters get something from the discretion of the court, on application for the consolidation rule: but, suppose they did not choose to apply for it, could the

court impose such terms?" "These," said Wightman, "may fairly be considered documents for the benefit of both parties." Per Lord Abinger. "Then you must file your bill: there is no law which yet enables us to give a discovery, as in equity." And per Alderson, B. "It would not be just to do so, if we had the power: it would be a discovery without the statement of the parties."

In Goldschmidt v. Marryat, there does not seem to have been any consolidation rule.

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*726] *WILLIAM BROWN and Others, Executors of ANTHONY BROWN, deceased, v. The Mayor and Commonalty and Citizens of the City of London. *Feb.* 1.

The corporation of London were empowered by various acts of parliament passed at a time when they claimed a right to the soil and bed of the river Thames, and exercised the power of conservancy thereof from Staines Bridge to Yantlett Creek, to borrow money to be expended in the improvement of the navigation of the river westward of London Bridge, and to levy tolls and duties upon boats and other vessels navigating the river between Staines and the bridge, and to charge the moneys borrowed under the acts upon such tolls, by way of life-annuity or bond.

The corporation accordingly raised large sums on bonds conditioned for the payment of certain yearly sums "out of the tolls and duties granted and made payable by virtue of the said acts," until payment of the principal; and such yearly sums were duly paid by them down to the passing of the Thames Conservancy Act, 20 & 21 Vict. c. cxlvii.

By that act,—which professed to be passed, amongst other things, for the purpose of carrying out an agreement between the Crown and the corporation for the settlement of conflicting claims between them in respect to the right to the soil and bed of the Thames,—the conservancy of the river is taken away from the corporation and vested in a newly created body of twelve conservators (of whom seven were members of the corporation of London), in whom all the right and interest of the Crown and of the corporation in the bed and soil of the river were vested, as well as the power to receive and apply the tolls above mentioned and all other tolls, dues, &c.

There was no express provision in the last-mentioned act either for discharging the corporation from liability on these securities, or imposing any liability upon the newly created body in respect of them:—

Held,—dissentiente Willes, J.,—that, the performance of the obligation by the corporation having been rendered impossible by act of the law, the obligation was discharged, and no action would lie against the corporation thereon.

THIS was an action brought by the plaintiffs as executors of one Anthony Brown, deceased, against the corporation of London, to recover the amount of ten several bonds each for 2000*l.* under the corporation seal. The declaration contained ten counts.

To each count the defendants pleaded as follows:—That the bond in the first (second, &c.) count mentioned was and is subject to a condition thereunder written, in the words and figures following, that is to say, Whereas, the above-bounden mayor and commonalty and citizens, in pursuance of an act of parliament, passed in the eighth year of the reign of Her present Majesty, intituled "An act to enable the mayor and commonalty and citizens of the city of London to raise a sum of money at a reduced rate of interest to pay off the moneys now charged on the tolls and duties payable by virtue of several acts for improving the *727] *navigation of the river Thames westward of London Bridge, within the liberties of the city of London, and to amend some of the said acts," have received of the above-named Anthony Brown the sum of 1000*l.* in part of the moneys authorized to be raised for the purposes of the said act of parliament, and in consideration thereof have agreed to grant an annuity of 35*l.* per annum, commencing from

the time and redeemable as hereinafter mentioned: Now, the condition of the above-written obligation is such, that, if the said mayor and commonalty and citizens, or their successors, do and shall, according to the true intent and meaning of the said act of parliament, out of the tolls and duties granted and made payable by virtue of the said acts, well and truly pay or cause to be paid unto the said Anthony Brown, his executors or administrators, or to his assigns, by endorsement as aforesaid, one annuity or yearly sum of 35*l.*, by half-yearly payments, clear of all taxes and deductions whatsoever, at or in the office of the chamberlain of the said city for the time being in the Guildhall of the same city, to commence and be computed from the 29th day of this instant January,—the first payment in respect of the proportionate part of the said annuity to be made on the 25th day of March now next ensuing, and the subsequent half-yearly payments to be thenceforth made on the 29th day of September and the 25th day of March in every year, or within fourteen days next after each of the said days respectively until payment or tender of the sum of 1000*l.* with all arrears of the said annuity (if any) at the office of the chamberlain of the said city for the time being in the Guildhall of the same city, out of the said tolls and duties, at the end of six calendar months after notice for that purpose shall be given by the mayor, aldermen, and commons of the said city of London in common council *assembled, in the London Gazette, then the above-written obligation to be void and of no [*728 effect, otherwise to be and remain in full force and virtue: Provided always, and it is hereby agreed and declared, that the said mayor, aldermen, and commons shall not exercise any of the powers contained in the said acts of parliament for paying off the said principal sum of 1000*l.*, or reducing the interest thereof, until after the expiration of eight years from the said 29th of January instant: Averment, that the said bond was granted and made in pursuance of the act of parliament therein recited, and for the considerations therein mentioned, and that from the time of making the said bond until the 29th day of September, 1857, when the Thames Conservancy Act, 1857, commenced and came into operation, the defendants did according to the true intent and meaning of the said act of parliament recited in the said condition, and of the condition of the said bond, out of the tolls and duties granted and made payable by virtue of the said acts, well and truly pay or cause to be paid to the said Anthony Brown and his executors the said annuity or yearly sum of 35*l.* by half-yearly payments, including the half-yearly payment which became due and payable on the said 29th day of September, 1857, clear of all taxes and deductions whatsoever, at and in the office of the chamberlain of the city for the time being in the Guild- ll of the same city, on or after the 25th day of March and the 29th y of September in every year; and that since the said Thames Con- rvancy Act, 1857, commenced and came into operation, and since the fendants paid the said half-yearly payment of the said annuity which came due on the said 29th day of September, 1857, the conservators the river Thames mentioned in the said act have received all the tolls nd duties granted and made payable by *virtue of the said acts [*729 the said condition mentioned, under and by virtue of the said Thames Conservancy Act, 1857, and out of which the said annuity was payable, and which were and are sufficient to pay the same; and that

the defendants had not since then had any such tolls or duties as are mentioned in the said condition, out of which they could pay the said annuity, or any part thereof.

The defendants joined issue upon each of these pleas, and also demurred thereto, the ground stated in the margin being, "that the pleas do not show anything which relieves the corporation from their obligation to pay the respective annuities, whilst they admit that there are and have been tolls and duties received out of which they might have been paid." Joinder.

Lush, Q. C. (with whom were *Quain* and *Kingdon*), in support of
*730] the demurrer.(a)—The Thames *Conservancy Act, 1857, 20 & 21 Vict. c. cxlvii., does not take away from the corporation of London the power to receive the tolls upon which these annuities are charged; and, if it does, that affords no answer to this action, inasmuch as they themselves were the parties who procured it to be passed. The statute recites several prior acts of parliament—amongst others, the 14 G. 3, c. 91, the 17 G. 3, c. 18, the 50 G. 3, c. cciv., the 52 G. 3, c. xlvi., the 54 G. 3, c. ccxxiii., the 5 G. 4, c. cxxiii., and the 8 & 9 Vict. c. i.,—under which the corporation were empowered to borrow various sums of money for the improvement of the navigation of the river Thames westward of London Bridge, *upon the credit of the tolls* and duties made payable by virtue of those acts, or some of them, by the sale of life-annuities, or by borrowing and taking up money at interest upon bond, or by both; and that the corporation had borrowed money under their common seal on the credit of the said tolls, and that a large amount of such moneys remained then charged upon the credit of the said tolls. It then recites an agreement between the Crown and the corporation for the adjustment of certain disputes which had arisen between them respecting the right to the soil and bed of the river. The 2d section creates a new body corporate, to consist of twelve members, to be called "The conservators of the River Thames," in whom are vested, by s. 52, all the powers of the Crown, and of the corporation of London. By s. 3, the Lord Mayor, two aldermen, and four members of the common council are to be members of the new conservancy board. The 136th section enacts that "all tolls, tonnage, port, and harbour dues
*731] which have been from time to time by any *act of parliament or otherwise given and granted to and been received by the mayor, &c., for the maintenance and improvement of the River Thames and port of London, and of the navigation thereof, or any part thereof, and

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the pleas respectively disclose no facts the effect of which is to discharge the corporation from their obligation to pay the annuities:

"2. That the only contingency, so far as appears, which would exonerate the corporation, would be the failure of the fund out of which the payments are to be made; whereas, it is admitted on the pleas that the fund has subsisted and subsists, and was and is sufficient for the payment:

"3. That the act whereby the conservancy of the river was transferred does not transfer to the new body the obligation to pay these annuities; and that, no provision having been made for the payment, though their continuance is recognised in the preamble, it is to be assumed that the obligation was intended to remain upon the corporation:

"4. That the practical result is, that the corporation are bound to provide for the payment out of the funds in the hands of the conservators; that the remedy of the annuitants for enforcing payment is against the corporation only; and that, if the corporation are not liable to them, the annuities would be virtually confiscated."

also all moneys which may be raised by the conservators under the authority of this act, together with all other moneys which may be received by the conservators from tolls, licenses, rents, fines, and any other source or fund whatsoever now legally applicable to the conservancy and improvement of the River Thames (except, &c.), shall form one fund, to be called the conservancy fund, and shall be applicable to and be applied by the conservators in the first place in paying the expenses of obtaining and passing this act or incident thereto, and afterwards in carrying this act into execution, anything in the said recited acts or any of them to the contrary in any wise notwithstanding." The 138th section enacts, that, "after the expiration of three years from the commencement of this act, if it shall at any time appear at any annual audit of the accounts of the conservators that the moneys received by them from any source within the previous year, and which shall be applicable to the purposes of the conservancy, shall have been more than sufficient to pay the expenses of the conservators within such year, then such surplus shall be applied in paying off any moneys which may have been raised by the conservators under the authority of this act, and also any moneys which for the time being may be due and owing on the credit of the fines, rents, tolls, *and other dues and profits by this act given to or vested in or authorized to be received by the conservators.*" And the 139th section, which provides for the application of the surplus of the conservancy fund, enacts, that, "when all the moneys which may have been raised by the conservators under the authority of this act, and *which for the time being may be due and owing on the credit of the fines, rents, tolls, and other dues and profits by this act [*732 given to, or vested in, or authorized to be received by the conservators, shall have been repaid, with all interest which may have accrued due in respect thereof, the surplus of the conservancy fund shall be applied in reduction of such of the tolls by this act authorized to be taken as the conservators shall from time to time think it expedient to reduce; and, in case there shall be any surplus of the said fund after the said tolls shall have been reduced to such extent as the conservators shall think fit, such surplus shall be applied to and for such purposes and in such manner as parliament shall direct." It clearly was not the intention of the legislature to lessen the value of these securities. There is no express provision in the act making the conservators liable upon them; nor is there any which either expressly or by necessary implication relieves the corporation of London from the responsibility of their obligations. If they do not continue liable, the remedy of the obligees is altogether gone. The inference, therefore, is irresistible, that the corporation remain liable as before the passing of the act. [WILLIAMS, J. —Could the corporation pay these annuities out of any other funds than those specified?] Probably not. They have at least a right still to receive as much of the tolls as will enable them to satisfy these bonds; or they have such a degree of control over the fund as to enable them to obtain the necessary assets from the conservators. It is indifferent whose is the hand to receive the tolls. At all events, the corporation of London are estopped from setting up this answer, they themselves having procured the act to be passed.

Mellish, Q. C. (with whom were *The Recorder* and **Ogle*), [*733

contrà.(a)—The pleas in this case establish a good defence within the rule, that, where the condition of a bond, good at the time of making it, becomes impossible of performance by act of the law, the condition is saved, and no action will lie upon the bond. The bonds in question are in truth debentures. It was found in practice that it was inconvenient, in carrying these acts into execution, to give securities upon the tolls by way of mortgage: the present form of security, which gave a charge in equity, and probably one capable of being enforced by mandamus, was therefore adopted. [ERLE, C. J.—There could be no remedy by mandamus, unless the party proceeded against had control over the fund.] The fund upon which these annuities are charged is transferred to the newly created body of conservators, subject to the
*734] charge. [ERLE, C. J.—It is quite consistent with these pleas *that the corporation of London had prior to the passing of the Conservancy Act received out of the tolls in question enough to satisfy the principal and interest of these bonds.(b)] The acts of parliament under which the corporation of London had authority to raise money for the improvement of the navigation of the River Thames, are all recited in the 1st section of the 8 & 9 Vict. c. i. The 7th section of that act enacts "that the sum and sums of money to be borrowed for raising the sum or sums of money by this act authorized to be raised, and interest for the same sum or sums of money, shall be paid and payable from time to time out of, and are hereby charged upon, the tolls and duties granted and made payable by virtue of the said recited acts; and all and every the person or persons who shall lend any sum or sums of money towards the sum or sums of money by this act authorized to be raised, shall have, receive, and enjoy out of the said tolls and duties granted and made payable by virtue of the said recited acts, interest after the rate of not more than 4*l.* per cent. per annum upon the sum or sums of money to be lent by him, her, or them respectively, in the manner in the said acts of the 50th, 52d, and 54th years of G. 3 directed or referred to, for payment of the interest of the money thereby respectively authorized to be borrowed; and the locks and other

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the condition being, according to the act of parliament therein recited, out of the tolls granted and made payable by virtue of the acts to pay the annuity, and the Thames Conservancy Act, 20 & 21 Vict. c. cxlvii., having divested the defendants of the tolls and duties, it has since the passing of the act and subsequent to the bond become impossible for the defendants to perform the condition by act of law, and the obligation is consequently saved:

"2. That the Conservancy Act is a necessary and inevitable act of law which excuses the performance of the condition, by taking from the defendants the funds out of which it was payable:

"3. That the condition imposes a conditional obligation to pay provided the defendants receive the tolls and duties out of which the annuity is made payable:

"4. That the Thames Conservancy Act transfers the tolls and duties with the charges upon them to the Thames Conservators, and the annuity-bonds sued on are by the acts under which they have been issued charges on these tolls and duties."

(b) The recorder stated that the fact was otherwise, and that, on the contrary, the tolls upon which these bonds were charged,—the tolls above bridge,—fell very short of sufficient to satisfy all the burthens upon them.

It was ultimately arranged that the pleas should be amended by inserting an allegation that the corporation had duly expended for the purposes provided by the acts of parliament all the moneys they had received, or had the right to receive, from the tolls, down to the passing of the Conservancy Act. The terms on which the amendment was to be made were to be settled by a judge.

*works by the said recited acts directed to be made, and the tolls and duties thereby granted, shall be and the same are hereby [*735 charged with and made subject and liable to the payment of the sums of money borrowed and to be borrowed as aforesaid; and the bonds and other securities to be given in pursuance of this act for the payment of the said sums of money, and interest thereon, shall be assignable by endorsement," &c. It is impossible to conceive words stronger than these for the purpose of making these securities a charge upon the tolls in question. And the condition of these bonds is, to pay out of those tolls. Then comes the Conservancy Act, which has all the force of a public act. "All acts which concern the King, who is the head of the commonwealth, are general laws of which the judges will take notice without pleading:" Com. Dig. *Parliament* (R. 6), referring to The Lord Cromwell's Case, 4 Co. Rep. 13 a, and The Prince's Case, 8 Co. Rep. 28 a. This was not an act of parliament obtained by the corporation for their own private purposes, or passed upon their solicitation. Disputes had arisen between the Crown and the corporation as to their respective rights in the soil and bed of the river; the Crown claiming it as part of its prerogative rights, and the corporation in respect of its powers of conservancy, which it struggled hard to retain. The act therefore passed for a public purpose. Its first recital is, that "the preservation and improvement of the River Thames is of great national importance." It then proceeds to recite that the Queen, "in right of Her Crown, is or claims to be seised of the ground and soil of the seas around the united kingdom of Great Britain and Ireland, and of the shores thereof so far as the sea flows and reflows between the high and low water marks at ordinary tides, and also of all rivers, creeks, and arms of the sea, and the *ground and soil thereof, and of the [*736 shores of the same respectively, between the ordinary high and low water marks from the mouths or entrances to the same from the main sea upwards, and into the country so far as the water flows and reflows at such ordinary tides, and of all the ports and havens of the United Kingdom, save and except only such parts of the said seas and sea-shores, rivers, creeks, and arms of the sea respectively, and of the shores thereof, and such ports and havens respectively, as are held by or are vested in certain bodies politic and corporate and others by prescription, or by or under grants from the Queen's Majesty or any of Her predecessors, or by or under acts of parliament; and the conservancy of such ports and havens, rivers, creeks, and arms of the sea as aforesaid, except as aforesaid, and except where the same is held by or is vested in certain bodies politic and corporate and others by prescription or otherwise, belongs to the Lord High Admiral or commissioners for executing the office of Lord High Admiral of the united kingdom; and that the mayor and commonalty and citizens of the city of London have from time immemorial had and exercised by the mayor of the said city for the time being during his mayoralty, or by his sufficient deputies, the conservation of the River Thames between Staines, in the county of Middlesex, and Yenleete, in the county of Kent." It then recites the several acts of parliament already referred to, and others, and recognises these moneys borrowed under the authority of those acts as being a charge upon the tolls for the maintenance and improvement of the river and navigation. It then recites the suit be-

tween the Crown and the corporation for the purpose of determining the rights of the parties to the soil and bed of the river, and sets out the agreement for the termination of that suit. It then recites various matters in *which the public are interested, and that "it is expe- *737] dient for these beneficial objects that the whole regulation of the River Thames should be under one uniform management and supervision of a permanent body of conservators, having all powers necessary for that purpose; and that it will be necessary that all the *powers, authorities, rights, and privileges* heretofore given or granted to, and which are now vested in, or which have been or may be exercised, used, or enjoyed by, the mayor, &c., of London, with reference or in relation to the conservation of the River Thames, should be transferred to and vested in and be exercised by the conservators appointed by or under the authority of this act." The act then proceeds to appoint twelve conservators, of whom seven are members of the corporation of London, and, by s. 50, vests in the body so constituted all the estate, right, title, and interest of the corporation and of the Crown in the bed and soil of the River Thames. The 52d section enacts, that, from and after the commencement of the act, all the powers and authorities, &c., of the Crown, and all the powers and authorities, rights, and privileges at any time theretofore given or granted to, or vested in, or exercised by the corporation, by prescription, usage, charter, or act of parliament, or otherwise, with relation to the conservancy, preservation, and regulation of the River Thames, &c., shall be vested in the conservators appointed by the act. Then, after various regulations as to tolls, the 75th section enacts, that "it shall be lawful for the conservators from time to time to lease or demise all or any of the said tolls for any term of years not exceeding three years at any one time, to take effect in possession and not in reversion, for such rent payable at such times and under such covenants as they shall think fit, which rent shall be *applied for the pur- *738] poses of this act."(a) Then come the sections already referred to, ss. 136, 138, 139, which direct how the conservators shall deal with the fund to be formed by "*all tolls*, tonnage, port, and harbour dues which have been from time to time by any act of parliament or otherwise given and granted to and been received and taken by the corporation for the maintenance and improvement of the River Thames and port of London, and of the navigation thereof, or any part thereof," &c. The whole scope and object of the act was, to release the corporation from all the duties and liabilities which had theretofore been imposed upon them as conservators of the Thames, and to transfer those duties and liabilities to the new body of conservators, who were to act as trustees, and to see to the due and proper application of the funds committed to their charge. To transfer any part of that duty to the corporation in the manner suggested, would clearly be a breach of trust. The principle of law upon which the defence in this case rests is thus stated in Com. Dig. *Condition* (D. 1): "If the condition of an obligation, recognisance, &c., was possible at the time of making, and afterwards becomes impossible by the act of God, of the law, or of the obligee himself, the obligation shall be saved." "So (D. 7), if the

(a) This refers to the tolls taken at the piers and jetties or landing-places erected for the convenience of steamboat passengers under the authority of the preceding sections, 57—74.

condition becomes impossible by the act of God, of the law, or of the obligee, the obligation shall be saved." Comyns refers to Co. Litt. 206 a, where it is said: "If a condition annexed to lands be possible at the making of the condition, and become impossible by the act of God, yet the state of the feoffee, &c., shall not be avoyded. * * * But, if a man *be bound by recognisance or bond with condition that he shall [*739 appear the next term in such a court, and before the day the conusee (*a*) or obligor dieth, the recognisance or obligation is saved; and the reason of the diversity is, because the state of the land is executed and settled in the feoffee, and cannot be redeemed back again but by matter subsequent, viz. the performance of the condition. But the bond or recognisance is a thing in action, and executory, whereof no advantage can be taken until there be a default in the obligor; and therefore, in all cases where the condition of the bond, recognisance, &c., is possible at the time of the making of the condition, and before the same can be performed the condition becomes impossible by the act of God, or of the law, or of the obligor, &c., there the obligation is saved." Again, Com. Dig. *Condition* (L. 13), "So, the performance of a condition shall be excused by an act of law which is necessary and inevitable; as, if a condition be that the feoffee pay so much out of the profits annually to charitable uses, if he dies, and his heir be in ward to the King, the payment shall be excused; for, it ought to be out of the profits, which are transferred by act of law to the King." For this Comyns cites Rol. Abr. *Condition* (I), pl. 1, where it is said "Regularment si un condition que fuit possible soit devenus impossible per l'act de Dieu, l'obligation est discharge." So, in Slade *v.* Thomson, Cro. Jac. 374, it is laid down, that an heir in ward of the King shall not be bound by a condition to pay a sum out of the *rents and profits* of the land; for, he is deprived of receiving them by the act of the law." The principle was recognised and acted upon in Davis *v.* Cary, 15 Q. B. 418 (E. C. L. R. vol. 69). The same rule applies to contract. [WILLES, J.—There is a distinction between the performance being illegal and impossible. In Paradine *v.* Jane, Aleyn 26, it was resolved, that "where the law *creates a duty or charge, and the party is [*740 disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him." "But, when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."] Here, it is submitted, the performance of the condition was not only impossible, but it was illegal.

Lush, in reply.—It is conceded that the annuities in question are made a charge upon the tolls. The corporation had the option of raising money on life-annuities or on bonds; and in either case the payment was charged upon the tolls. If the acts of parliament had merely enabled the corporation to raise the money by mortgages on the tolls, they could not have obtained it on so advantageous terms, as the only remedy the lenders would have had would have been in equity. It was intended that the lenders should have a two-fold security, viz. a bond under the corporation seal, and a charge amounting to an equitable assignment of the tolls. There is nothing in the Conservancy Act to

(*a*) "Conusor."

affect the security of the bond-holders, who advanced their money upon the faith of the acts of parliament and upon the security of the corporation. If the legislature had intended to relieve the corporation from liability in respect of these bonds, it was very easy to say so. [WILLIAMS, J.—We can hardly have the complete intention of the legislature before us.] There is no difficulty and no injustice in holding that the corporation are bound still to see to the application of this fund. They might call upon the conservators to pay over to them out of the tolls upon which these bonds are charged a sum sufficient to discharge their *741] *liability. [WILLES, J.—You say that, if the conservators neglected their duty, and left the corporation liable to be sued upon these securities, the corporation would have a right of action against them.] Some remedy. [WILLIAMS, J.—If you can establish that the corporation might have a mandamus to compel the conservators to appropriate a sufficient portion of the funds in their hands to pay these bonds, you certainly will advance your argument a long way.] It would require very strong language to show that the legislature intended to prejudice the securities of these bond-holders: it never could have been intended that they should be affected by mere inference and conjecture to be drawn from an act of parliament to which they were no parties and of which they had no notice. The securities can only be subsisting securities by retaining the liability of the corporation. It is said that the plaintiffs have as good a remedy against the new body as they had against the old one. That, however, is not so. Edwards v. Lowndes, 1 Ellis & B. 81, is an authority to show that no action would lie against them. By stat. 6 G. 4, c. cxxxi., commissioners were appointed as trustees to carry out the purposes of the act. By s. 91, it was directed, that, after payment of the expenses of the act, the remainder of the money in the hands of the trustees "should be applied at the discretion of the said trustees" in payment of various things, amongst others, "in paying the salary of the organist of B. church, and in reducing, paying off, and discharging the several principal sums of money (and interest)" borrowed on mortgage by virtue of the act. By a provisional order of the general board of health (confirmed by stat. 13 & 14 Vict. c. 108), the powers and duties of the trustees were vested in the local board of health for B. In an action on the case by the organist *742] of B. church against the local board of *health, for a breach of duty in not paying his salary, alleging that they had sufficient funds for the purpose, it appeared at the trial that the board had funds applicable to the payment of the salary, though the mortgage-debt not yet paid exceeded the cash balance in hand: and it was held that the board and the organist stood in the relation of trustee and cestui que trust, and that, in the absence of a specific appropriation of a part of the fund to the plaintiff, no action at law lay,—the remedy being in equity. And in the judgment of Lord Campbell, the case of Cane v. Chapman, 5 Ad. & E. 547 (E. C. L. R. vol. 31), 1 Nev. & P. 104 (E. C. L. R. vol. 36), which was cited as an authority to show that such an action would lie, is very strongly commented upon, if not expressly overturned. If the corporation have power to procure the funds to be applied in the manner suggested, they are not in the position of persons from whom the funds which they have charged have been taken away by act of the law, and the performance by them of the condition has

not become impossible. And, if the performance has become impossible by the act of the obligors themselves,—without whose assent the Conservancy Act would never have been passed,—the obligation is not discharged. [ERLE, C. J.—The fund originally charged, was, the western tolls, that is, the tolls received above London Bridge. By the Conservancy Act, the whole of the tolls both above and below bridge are blended into one common fund: and the claims of the bond-holders are now charged upon the whole.] That does not affect the argument.

ERLE, C. J.—I am of opinion that our judgment upon this demurrer ought to be for the defendants. The defendants entered into an obligation subject to a condition of paying an annuity of 85*l.* to one Anthony Brown, his executors, &c., payable out of the tolls *which are recited in the act of parliament under which the bond was made [*743 (8 & 9 Vict. c. i.) to be payable by virtue of several acts for improving the navigation of the River Thames westward of London Bridge; and the duty of the defendants under their bond was to apply those tolls in payment of the annuity, if the tolls were sufficient for that purpose: and, if they could not by law so apply the tolls, they are not liable on their bond. For some years after the bond was given, the tolls were collected and the annuity paid. But, in the year 1857, an act of parliament passed to provide for the conservancy of the River Thames; and in that act of parliament are contained certain provisions which afford a defence against the claim of the plaintiffs in the present action. The right which the plaintiffs had under this bond, was, a right to compel the corporation of London, so long as they could legally receive the tolls in question, and such tolls were sufficient, to pay them the annuity. That was the extent of their security.

Now, the act of parliament (20 & 21 Vict. c. cxlvii.) recites an agreement between the Crown and the corporation of London for the settlement of disputes between them relative to the ownership of the bed and soil of the Thames, and creates (s. 2) a new corporation by the name of "The conservators of the River Thames," in whom are vested (s. 50) all the estate and interest of the corporation of London and the Crown in the bed and soil of the river from Staines to Yantlet Creek. It blends the tolls and duties receivable above London Bridge with those receivable below London Bridge down to Yantlet Creek. It creates one common fund, and charges that one common fund with one common set of liabilities: and, having in effect transferred to the conservators the powers, authorities, and privileges which were before vested in the *corporation with respect to the River Thames, and in particular [*744 the right to receive tolls, including the tolls out of which the annuity in question was to be paid, the act then contains, in s. 136, an appropriation of the fund thus created, in the first place to the payment of the expenses of obtaining and passing the act, or incident thereto, and afterwards in carrying the act into execution.

It seems to me that the attention of the legislature was not specifically drawn to the rights and liabilities under these bonds. There is no express enactment on the subject, as I cannot help thinking there would have been if it had been present in the minds of the framers of the act. But, under the 136th section, the tolls are applicable to the carrying the act into execution; and several subsequent sections show that it was contemplated that the "conservancy fund" should be charged

with the liabilities which had been charged upon the tolls before they were transferred to the new body. And that, I think, authorized the conservators to pay these annuities. The 138th section provides, that, "after the expiration of three years from the commencement of this act, if it shall at any time appear at any annual audit of the accounts of the conservators, that the moneys received by them from any source within the previous year, and which shall be applicable to the purposes of the conservancy, shall have been more than sufficient to pay the expenses of the conservators within such year, then such surplus shall be applied in paying off any moneys which may have been raised by the conservators under the authority of this act, *and also any moneys which for the time being may be due and owing on the credit of the fines, rents, tolls, and other dues and profits by this act given to, or vested in, or authorized to be received by, the conservators.*" Clear I am that the legis-
*745] lature must have *contemplated that the annual tolls had been applied to the payment of the annual charges. Then comes the 139th section, which provides for the ultimate application of the surplus of the conservancy fund, and which enacts, that, "when all the moneys which may have been raised by the conservators under the authority of this act, and which for the time being may be due and owing on the credit of the fines, rents, tolls, and other dues and profits by this act given to or vested in or authorized to be received by the conservators shall have been repaid, with all interest which may have accrued due in respect thereof, the surplus of the conservancy fund shall be applied in reduction of such of the tolls by this act authorized to be taken as the conservators shall from time to time think it expedient to reduce; and, in case there shall be any surplus of the said fund after the said tolls shall have been reduced to such extent as the conservators shall think fit, suchs urplus shall be applied to and for such purposes and in such manner as parliament shall direct." It seems to me that the operation of these sections is, to take away from the corporation of London the legal right to receive the tolls out of which these annuities are payable. The duty of the corporation was to demand and collect these tolls as long as they had a legal right to do so, and, having received them, to appropriate the money towards the satisfaction and payment of the charges upon them. The act of parliament, as I read it, has taken away from the corporation the power of collecting the tolls, and transferred it to the newly constituted body of conservators, and has imposed upon the conservators themselves the duty of applying the tolls in the way mentioned. And it seems to me that the conservators would be doing an act of very questionable validity in law, if, having received
*746] tolls out of which they were bound to pay these annuities, *they were to hand them over to a third person for the purpose of making the payment. They would be in peril of being called upon to make good his default, in the event of any improper application of the fund. The act of parliament has in my opinion created a direct obligation on the conservators to receive and apply the whole of the tolls whether westward or eastward of London Bridge; and, having imposed that obligation and that duty on the conservators, it has to my mind taken it out of the legal power of the corporation of the city of London to pay these annuities out of tolls which they could no longer receive.

Much has been said about parliament not intending that the holders

of these bonds should be prejudiced or deprived of any remedy. And they are supposed to have a certain marketable value by reason of the right of the obligees to resort to an action or other proceeding against the corporation of London, if they failed duly to collect and apply the tolls. To my mind that is a very shadowy and imperceptible value. The annuities are chargeable on a given fund: if that fund is available and solvent, the holders of the bonds will receive their annuities: if the fund fails, I cannot see what advantage could accrue to the parties from obtaining a nominal judgment against the corporation. The obligees have the same power of seeing to the application of the fund in the hands of the conservators as they would have had in the hands of the original obligors. I do not know whether an action would lie: but, according to my experience when I was in the Court of Queen's Bench, if a certain fund were granted to a corporate body, and that fund was charged with a debt by virtue of an act of parliament, the corporation might be compelled by mandamus to apply the fund in the manner directed by the act. But, whether the remedy be by action at law, by mandamus, or by suit *in equity, I do not think there is any [*747 practical difficulty in the way of the holders of these bonds enforcing payment out of the tolls, if sufficient. The learned counsel for the plaintiffs seemed to suggest, if I correctly apprehended the tenor of his argument, that the obligors might sue the corporation, and then the corporation might have a remedy over against the conservators. I am at a loss to see what legal remedy the corporation could have against the conservators. And if they could, there would be extreme inconvenience in such a circuitous remedy. Having given my best attention to the arguments urged on both sides, the conclusion I feel compelled to come to is, that the Conservancy Act affords a good defence to the corporation against this action, and that there should be judgment for the defendants.

WILLIAMS, J.—I am of the same opinion. The instrument upon which this action is brought is not an absolute contract on the part of the defendants to pay the several sums mentioned in the bonds. But it is a contract with a condition. Now, the law as to such contracts is clear. If the condition has been performed, the obligation is discharged: and it is equally discharged, if, instead of the condition having been performed, its performance has been prevented by the act of God or the act of the law. The question therefore is, whether upon the whole record it appears that the performance of the condition of this bond has been prevented by an act of the law. It seems to me that it has. The effect of the statute of 20 & 21 Vict. c. cxlvii. is this, that, whereas the obligation was that the corporation of London should pay these annuities out of the proceeds of certain tolls, the statute has brought it about that the corporation no longer have any power to collect those tolls. It has therefore become impossible for the defendants to pay *the [*748 annuities out of those tolls, unless, indeed, it can be successfully contended that the new body, the Thames conservators, can be considered as receiving the tolls as trustees or receivers on behalf of the corporation of London. It may be that the defendants might be able to procure from the conservators, either from their sense of propriety, or from motives of convenience, or from a consciousness that they themselves may be ultimately liable, funds arising from the moneys collected

by them sufficient to enable them to discharge the annuities. And even that, I apprehend, would not be a payment by the defendants out of the tolls. But it is a very different question whether the corporation have by act of law been prevented from discharging their obligation by payment. It is difficult to say that the Thames conservators could be said in any sense to be trustees or receivers for the corporation. It may be, —though upon that I offer no opinion,—that the plaintiffs might by resorting to a court of equity compel the conservators to pay these annuities. But that would only show that they were in some sort trustees for the plaintiffs. The question is whether they can be considered as trustees for the defendants. I see nothing in the act of parliament to warrant the conclusion that they are so. I think there is no pretence for saying that the defendants any longer have, either by themselves or by any other persons as trustees for them, power to collect these tolls and apply them to the payment of these annuities. They have been prevented by act of law from receiving the fund upon which the annuities are charged, and consequently from discharging the duties imposed upon them as obligors to pay them. The 20 & 21 Vict. c. cxlvii. is a public act, and therefore I think the passing of it cannot be said to have been procured by the obligors, so as to bring the case within the rule *749] that *the performance of a condition is not excused by reason of its having become impossible, where such impossibility of performance has been brought about by the acts or conduct of the obligor himself.

WILLES, J.—As I understand this case, the bonds in question were given by the corporation of London, in the ordinary form, for a penal sum of 2000*l.* each, conditioned for payment of a yearly sum out of the tolls and duties payable by virtue of certain acts for improving the navigation of the river Thames westward of London Bridge, which may be called for the sake of brevity the western tolls, with an option to the obligors, if they thought fit, upon giving six months' notice, to redeem the annuity by paying off the principal with all arrears. In substance,—no notice having been given,—the instrument is simply a bond for payment of an annuity out of the western tolls. Then comes the Thames Conservancy Act, 20 & 21 Vict. cxlvii. by which all the tolls and duties formerly received by the corporation of London are taken away from them and vested in a newly created corporate body called "The Conservators of the Thames." I will assume,—for I think that has been sufficiently established by the 138th and 139th sections of the act,—that the conservators have a duty imposed upon them, after discharging certain expenses referred to in the act, to apply all the tolls and duties, as well the western as the eastern, to the payment, amongst other charges, of the annuities in question. There is no provision in express terms that the liability of the corporation of London is to cease altogether; nor is there anything in the act of parliament from which that can be inferred, except the provisions I have referred to. And I apprehend there is nothing upon which the defence to this action can be *750] rested, unless it be that rule *of law which has been relied upon in the very able argument of Mr. *Mellish*, viz. that, where the performance of the condition of a bond has become impossible by act of law, the obligation is saved. Upon that rule of law only can it be maintained that the corporation are absolved from their engagement.

Before coming to consider that question, I must say that we are dealing with what appears to me to be a very grave matter, viz. the alleged cancellation by the effect of an act of parliament of a contract which has been entered into between two parties. I must own, that, if that proposition were stated to me, I should scan the act of parliament very closely before I could arrive at the conclusion that such was to be its operation. I cannot help doing so here. I have not gathered from the argument, nor do I find, on looking at the statute itself, anything which either expressly or by necessary implication produces that result: and it is only upon the principle relied on by Mr. *Mellish* that this defence can be sustained. I apprehend,—and I say it with profound deference and respect for the opinions of the rest of the court, but, though conscious that I am in all probability wrong, I am bound to express the opinion which I have formed,—that principle is not applicable here, but that it applies to the case of an absolute physical impossibility. I exclude the case of performance becoming illegal. In so far as the tolls to which the condition of the bond refers were by the Conservancy Act applied to purposes other than the payment of these annuities, I conceive that act has made it impossible that the condition should be performed. In this respect I take it the case stands upon the same footing as the tolls in the repealed act of parliament in the case of Davis *v.* Cary, 15 Q B. 418 (E. C. L. R. vol. 69). It is quite clear, that, if an act of parliament states that a fund shall be applied in a particular way, it cannot be *applied in any other way. Here, it would be illegal [*751
for the conservators to apply the tolls in any other way than that pointed out by the statute, and consequently illegal to apply them in payment of these annuities. So far I agree with what has fallen from my Lord and my Brother Williams. But, as at present advised, my opinion altogether varies from theirs, on the ground that this plea does not state that there are not at this moment in the hands of the conservators, after payment of all expenses and other matters charged upon the conservancy fund, moneys arising from the western tolls sufficient to meet the annuities, or some part thereof. I apprehend the plea could not truly have said so. The amendment which has been consented to states that the corporation duly applied to the purposes of the acts all moneys which came to their hands, or which they had a right to receive, down to the time of the passing of the Conservancy Act. The plea does not state, and I presume it could not, or it would have been stated in the amendment, that the conservators had not since the passing of the act received moneys in respect of the western tolls, over and above the purposes to which those tolls or the general fund are made applicable by the new provision, towards payment of these annuities or some part thereof. It is in respect of these tolls that it appears to me that the defendants, the corporation of London, are liable. I see nothing at all inconsistent or unreasonable in holding that they are bound to see to the application of these tolls to the satisfaction of the annuities. The tolls are still existing in point of fact, and capable of being applied to the purpose to which they were originally destined. They are, it is true,—that is, the power of receiving them is,—taken away from the corporation by the statute, and vested in the conservators. But it must be remembered that you must hold one of two things,—*either that the [*752
plaintiffs are driven to receive payment from the hands of the

conservators, in respect of a new liability arising under the act of parliament, by action at law, by mandamus, or by bill in equity (an alternative which I cannot look upon as being practically equivalent to a clear and certain remedy by action on the bond, and which may compel the plaintiffs to run the gauntlet of the several courts in order to ascertain and enforce their rights), or (that which appears to me to be equally rational and is more consistent with my notions of the propriety of keeping all contracts inviolate except where they are interfered with by the express provisions of an act of parliament) you may say that the corporation still remain liable to see to the proper application of the western tolls. I see no reason why they should not procure that to be done: on the contrary, I can see very good reason why they should. In the section immediately following that which incorporates the conservators, viz. in s. 3, I find that the corporation of London is amply represented at the board,—of the twelve conservators, one being the Lord Mayor, two aldermen, and four common councilmen. They have therefore abundant means of persuading the board of conservators to apply the funds applicable under the Conservancy Act in discharge of their liability on these bonds. If they fail to do so, I must confess I see no reason why the plaintiffs should not sue the corporation upon the bonds, and apply that sort of pressure to the conservators. It seems to me to be much more reasonable to hold that the intention of the legislature was, that the conservators should become primarily liable, and that in respect of funds more extensive than those which were originally made applicable to the payment of the particular charges; but that the corporation should still remain liable and bound to see to the application
*753] *of the original and more limited fund. That is the substance of my opinion on the matter. I do not feel at all pressed by the argument which was urged by Mr. *Mellish* as to the accounts under the new state of things being blended. That is a mere matter of figures. I do not see why the accounts should not be dissected, so as to show what portion of the tolls remains specifically applicable to the payment of these annuities. I have perhaps gone into the explanation of my views at too great length: but, as I have the misfortune to differ from my Lord and my two learned Brothers, I thought it more satisfactory and more respectful to them that I should fully state the opinion which I entertain.

KEATING, J.—I am of opinion that the defendants are entitled to the judgment of the court upon this record. At the time these bonds were entered into, the corporation of London were charged with the conservancy of the River Thames between Staines Bridge and Yantlet Creek, and had vested in them the right to receive the tolls in question and the power to charge them. The condition of the bonds upon which the action is brought recites the act of parliament under which the tolls are charged with these moneys; and then it goes on to state the condition to be, that, if the said mayor, &c., should, according to the true intent and meaning of the said act of parliament, out of the tolls and duties granted and made payable by virtue of the said acts, well and truly pay unto the obligee, his executors, &c., an annuity of 35*l.*, &c., the obligation should be void, &c. What, then, was the obligation of the defendants? To pay the annuity out of these tolls according to the true intent and meaning of the existing acts of parliament. Has

the power of the corporation to perform that condition been subsequently *rendered impossible by act of law? I am of opinion that it has. The statute 20 & 21 Vict. c. cxlvii. takes away the [*754 conservancy of the River Thames entirely from the corporation of London, and vests it in a body then newly created under the name of "The Conservators of the River Thames,"—a body which, though it contains among its members some individuals of the corporation of London, is a totally different and distinct body from that corporation. It is clear that the tolls are vested in this new body: and it seems to be conceded that the statute imposes upon them the obligation out of those tolls to pay the bonds in question, amongst other charges and encumbrances. How the holders are to enforce their remedy against them, for the purposes of to-day, appears to me to be wholly immaterial. That the conservators are liable to pay these bonds, and that the tolls in question are charged with the payment of them, seems quite clear: and, indeed, this too was conceded by Mr. *Lush*. But it is said that the payment must take place through the medium of the corporation. I do not think that is the correct reading of the act of parliament. It appears to me that the power of the corporation to perform the obligation by paying the money out of the tolls and duties granted and made payable by virtue of the acts recited in the condition, has, by the admission of the plaintiff, become impossible by act of law. I will not repeat what has already been said with greater force by my Lord and my Brother Williams. I will only say, that, for the reasons they have given, it seems to me that the effect of the Conservancy Act clearly is to render impossible the performance of the obligation by the corporation, and that the defendants are entitled to judgment.

Judgment for the defendants.

*READE *v.* CONQUEST. *Feb.* 25. [*755

Dramatising a novel and causing it to be represented on the stage without the author's consent is no infringement of his copyright therein.

THIS was an action for an alleged infringement by the defendant of the plaintiff's copyright.

The first count of the declaration stated, that, after the passing of a certain act of parliament made and passed in the third year of the reign of His late Majesty King William the Fourth, for amending the laws relating to dramatic literary property (3 & 4 W. 4, c. 15), and after the making and passing of a certain other act of parliament made and passed in a session of parliament holden in the fifth and sixth years of the reign of Her Majesty Queen Victoria, for amending the law of copyright (5 & 6 Vict. c. 45), and before and at the times of the representation and performance and the causing of the representation and performance by the defendant in that count thereinafter mentioned, he the plaintiff was and is the duly registered author and proprietor of, and had and still has the sole liberty of representing and causing to be represented at any place or places of dramatic entertainment in Great Britain, a certain duly registered play or dramatic piece or entertain-

ment composed by him the plaintiff, called "Gold:" Nevertheless, after the passing of the said acts, and within twelve calendar months next before the commencement of this suit, while the plaintiff was such author and proprietor, and had such sole liberty as aforesaid, the defendant, on divers, to wit, one hundred occasions, without the consent in writing of the plaintiff first had and obtained, represented and performed, and caused to be represented and performed, divers parts of the said play or dramatic piece or entertainment, at a certain
*756] place of dramatic *entertainment in England, to wit, at the Grecian Theatre, in the county of Middlesex, contrary to the said statutes, and to the great damage of the plaintiff; whereby and by force of the statutes in such case made and provided, the defendant had forfeited and become liable to pay to the plaintiff the sum of 40*s.* in respect of each and every such representation,—each of the said sums of 40*s.* being respectively the greatest damage arising respectively out of the injury or loss sustained by the plaintiff from the said representations respectively: yet the defendant had not paid the said sums, or either of them, or any part thereof.

Second count,—that, before and at the time of the committing of the grievances by the defendant thereinafter mentioned, there was subsisting copyright in a certain duly registered book, namely, a tale, novel, or story intituled "It is never too late to mend;" and the plaintiff was then the duly registered proprietor of such copyright, and the defendant, while such copyright was still subsisting, and while the plaintiff was the proprietor thereof as aforesaid, and after the passing of an act made and passed in the session of parliament holden in the fifth and sixth years of the reign of Her present Majesty, for amending the law of copyright (5 & 6 Vict. c. 45), the defendant, without the consent of the plaintiff, dramatized the said novel, tale, or story, and book, and publicly represented and performed, and caused to be represented and performed, as a drama, on divers, to wit, one hundred occasions, the said book and the said novel, tale, or story, at a certain place of dramatic entertainment in England, to wit, the Grecian Theatre, in the county of Middlesex, for profit and reward to the defendant; and thereby the sale of the said book was greatly injured, and the plaintiff, by reason of the premises in that count, was prevented from selling many copies
*757] *of the said book which he would otherwise have sold at a great profit to the plaintiff, and would also be prevented from selling many other copies of the said book which he would otherwise have been able to sell at a great profit to the plaintiff; and the plaintiff also had been and was and would be wholly prevented from dramatizing the said book, novel, and story, and from selling it as dramatized, and from selling or letting to managers of theatres and others the right of performing it as dramatized: Claim, 500*l.*

The defendant demurred to the second count, the ground of demurrer stated in the margin being, "that the acts complained of, viz. the defendant's dramatizing the plaintiff's novel, and representing the said drama, were no infringement of the plaintiff's copyright, and not wrongful acts." Joinder.

Lush, Q. C., in support of the demurrer.(*a*)—Copyright, whatever it

(*a*) The points marked for argument on the part of the defendant were as follows:—
"1. Copyright is defined by statute to be the sole and exclusive liberty of printing or otherwise

may formerly have been, is now only the creature of the statute. [ERLE, C. J.—Two noble and learned lords gave elaborate opinions to that effect in Jeffreys *v.* Boosey, 4 House of Lords Cases 815; but that was not the adjudication of the House.] Dramatic copyright is protected by the 3 & 4 W. 4, c. 15. The plaintiff's case clearly does not fall *within that. He is not the author of any "tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment:" he is the author of a book from which the defendant has gathered the materials for constructing a dramatic entertainment. Then the Copyright Act, 5 & 6 Vict. c. 45, does not prohibit the dramatizing or representing on the stage the plot or story of a published novel; but merely the multiplication without the consent of the author of a published book. Neither statute, therefore, applies to the present case. [ERLE, C. J.—The Dramatic Copyright Act only applies to the representing at a place of dramatic entertainment a tragedy, &c., the production of the author's brain, whether printed and published or not. WILLIAMS, J.—I should have thought that what is complained of in the second count would rather tend to increase the sale of the plaintiff's book. In Murray *v.* Elliston, 5 B. & Ald. 657 (E. C. L. R. vol. 7), the manager of Drury Lane Theatre was held not liable to an action for having publicly represented for profit an abridgment of Lord Byron's tragedy of Marino Faliero, without the consent of the owner of the copyright, although the tragedy had been previously printed and published for sale.] The argument which was there successfully urged on the part of the defendant, was, that persons go to a theatrical entertainment, "not to read the work, or to hear it read, but to see the combined effect of poetry, scenery, and acting. Now, of these three things, two are not produced by the author of the work; and the combined effect is just as much a new production, and even more so than the printed abridgment of a work.(*a*) There are many instances in which works published have thus, without permission of their authors, been brought upon the stage. The safe rule for the court to lay down, is, that an author is only *protected from the piracy of his *book* itself, or some colourable imitation of it." [*758] [*759]

Coryton, contrà.(*b*)—By the 5 & 6 Vict. c. 45, s. 2, copyright is construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of a *book* (including "every volume, part or division of a volume, pamphlet, sheet of letter-press," &c.) or a *dramatic piece* (including "every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment.") If dramatic copyright do not extend to a case like the present, it is difficult to see what it does em-

multiplying copies of a book; and the right of an author does not extend beyond the right so defined: 5 & 6 Vict. c. 45, s. 1:

"2. Piracy, or the infringement of copyright, does not extend beyond illegally printing copies of a book in which there is copyright, or publishing copies illegally printed: s. 15:

"3. Dramatizing a novel is no infringement of copyright: it is no more than reading or reciting in public the novel, or parts of it."

(*a*) Gyles *v.* Wilcox, 2 Atk. 141.

(*b*) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the author of a dramatic composition has at the common law a right, as regards its public representation, analogous to that of copyright; and that such right is not invalidated by the publication of such composition in a form not expressly adapted to the stage:

"2. That the dramatizing and representing on the public stage of a composition dramatic in essence, though not in form, is an infringement of such right as modified by statute."

brace. A right of this description is protected by the French law: see Le Blanc's work on Piracy. [ERLE, C. J.—Perhaps the only way in which the author of a novel can protect himself from this sort of infringement, is, by dramatizing it himself.] May he not do so at any time? The statute is merely declaratory of the common law on the subject. In Turner v. Robinson, 10 Irish Chan. Rep. 121, 510,—where the question was, whether at common law the owner of a picture had a right before publication to prevent any copy being made of it,—the Master of the Rolls says (p. 131): "There is no statute for the protection of the copyright in a painting. The only remedies, therefore, which a painter has in case of piracy, are,—first, an action at the common law, *760] —secondly, a suit in *equity for an injunction, founded on the common law right,—thirdly, a suit in equity, where the piracy has been accompanied by circumstances of fraud, or breach of trust, confidence, or contract, express or implied. With respect to the common law right, it is laid down by Lord Cottenham, in Prince Albert v. Strange, 1 M'N. & G. 25, 42, 1 Hall & Twells 1,—'The property of an author or composer of any work, whether of literature, art, or science, in such work unpublished, and kept for his private use or pleasure, cannot be disputed, after the many decisions in which that proposition has been affirmed or assumed.' Most of the authorities on the subject are collected and referred to in that case. That a picture is analogous to a manuscript appears also from the opinion of Lord Cranworth in Jefferys v. Boosey, 4 House of Lords Cases 833. Lord St. Leonards, in giving judgment in that case, said,—'The common law does give a man who has composed a work a right to that composition, just as he has a right to any other part of his personal property; but the question of the right of excluding all the world from copying, and of himself claiming the exclusive right of for ever copying his own composition after he has published it to the world, is a totally different thing.' The opinion of Lord Brougham was to the same effect. It is not necessary to go through the authorities collected in the cases to which I have referred, as I apprehend it is clear, that, by the common law, copyright or protection exists in favour of works of literature, art, or science, to this limited extent only, that, while they remain unpublished, no person can pirate them, but that, after publication, they are by the common law unprotected. There has been much difference of opinion on this subject amongst the judges in England; but the law is now considered to be as I have stated it." Lord Chancellor Brady, on that case coming before *761] him on appeal (10 *Irish Chan. Rep. 510), said: "The copyright in books is protected by the 8 Anne, c. 19; copyright in engravings is also guarded by statute; and that in a species of works of art very analogous to that now under the consideration of the court, viz. sculpture, is protected by the 38 G. 3, c. 71, and the 54 G. 3, c. 56: but copyright of this statutory kind, which may be said to arise from publication, and which was intended to induce persons to publish their works without danger to their property, has never been created in the same way as regards paintings; therefore, the owner of such works of art cannot rest upon statutory copyright, and he is thrown back upon what was discussed at length in the latter part of the argument addressed to us, viz. his copyright at common law." The contention of Mr. Justice Yates in Millar v. Taylor, 4 Burr. 2303, 2355, 2368, can hardly apply

to things which are constantly undergoing modification. Nihil quod est contra rationem est licitum: Co. Litt. 97 b: and see the commentary of Lord Coke on the words of Littleton, § 213, "Of common right," Co. Litt. 142 a. Lord Mansfield, in his very learned judgment in Millar *v.* Taylor, says,—pp. 2398, 2399,—"From what source is the common law drawn, which is admitted to be so clear in respect of the copy *before* publication? From this argument,—because it is just that an author should reap the pecuniary profits of his own ingenuity and labour. It is just that another should not use his name without his consent. It is fit that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide not to foist in additions: with other reasonings of the same effect. *I allow them sufficient to show it is agreeable to the principles of right and wrong, the fitness of things, convenience and policy, and therefore to the common law, to protect the copy *before* publication. But the same reasons hold *after* the author has published. He can reap no pecuniary profit, if, the next moment after his work comes out, it may be pirated upon worse paper and in worse print, and in a cheaper volume. The 8th of Queen Anne is no answer. We are considering the common law, upon principles before and independent of that act. The author may not only be deprived of any profit, but lose the expense he has been at. He is no more master of the use of his own name. He has no control over the correctness of his own work. He cannot prevent additions. He cannot retract errors. He cannot amend, or cancel a faulty edition. Any one may print, pirate, and perpetuate the imperfections, to the disgrace and against the will of the author; may propagate sentiments under his name which he disapproves, repents, and is ashamed of. He can exercise no discretion as to the manner in which or the persons by whom his work shall be published. For these and many more reasons, it seems to me just and fit to protect the copy *after* publication. All objections which hold as much to the kind of property *before* as to the kind of property *after* publication go for nothing: they prove too much. There is no peculiar objection to the property *after*, except that the copy is necessarily made common after the book is once published. Does a transfer of paper upon which it is printed necessarily transfer the copy, more than the transfer of paper upon which the book is written? The argument turns in a circle. 'The copy is made common, because the law does not protect it; and the law cannot protect it because it is made common.' The author does not mean to make it common: and, if *the law says he ought to have the copy after publication, it is a several property, easily protected, ascertained, and secured. The whole, then, must finally resolve in this question, whether it is agreeable to natural principles, moral justice, and fitness, to allow him the copy *after* publication as well as *before*. The general consent of this kingdom for ages is on the affirmative side. The legislative authority has taken it for granted, and interposed penalties to protect it for a time." The judges there were by a majority of three (Lord Mansfield, and Mr. Justice Willes, and Mr. Justice Aston) against the opinion of one (Mr. Justice Yates) in favour of the common law

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right. The term of copyright as provided by the 5 & 6 Vict. c. 45, is by s. 20 extended and applied to the liberty of representing dramatic pieces under the 3 & 4 W. 4, c. 15.

Lush, Q. C., in reply.—It is too late now to say that copyright existed at common law. [WILLIAMS, J.—Lord Campbell intimated a pretty strong opinion in Boosey *v.* Jefferys, in the Exchequer Chamber, 6 Exch. 580, that there was no copyright at common law. ERLE, C. J.—In Donaldson *v.* Beckett, 4 Burr. 2408, 2 Bro. P. C. 129, eight of the judges (against four) thought there was.] In giving his opinion in the House of Lords in Jefferys *v.* Boosey, Lord Brougham says (4 House of Lords Cases 961): "The difference of opinion among the learned judges on the various points of the present case are not greater than existed when Donaldson *v.* Beckett was decided here in 1774, and when, in 1769, in the case of Millar *v.* Taylor, the judges of the Court of King's Bench had been divided in opinion for the first time since Lord Mansfield presided in that court. In this House they were, if we reckon Lord Mansfield, equally divided upon the main question, whether or not
*764] the action at common law is taken away by the *statute, supposing it to have been competent before; and they were divided as nine (or with Lord Mansfield ten) to three, and as eight to four, upon the two questions touching the previously existing common law right. This House, however, reversed the decree, under appeal, in accordance with the opinion given on the main point by the majority of the judges; and, upon the general question of literary property at common law, no judgment whatever was pronounced." That question, however, does not arise here. It is not suggested that the defendant multiplied copies of the plaintiff's book. The complaint is, that the defendant has dramatized the story and caused it to be represented at his theatre. There is no authority for saying that this was any offence at common law, or any invasion of the plaintiff's common law right: and it is clear that the representing on the stage is no infringement of the plaintiff's right under the statute: Coleman *v.* Wathen, 5 T. R. 245. [WILLIAMS, J.—Did it appear there that "The Agreeable Surprise" had been printed and published?] The report is silent as to that: but it must have been published, for the action was brought for penalties under the 8 Anne, c. 19. All that was decided in Turner *v.* Robinson, 10 Irish Chan. Rep. 121, 510, was, that merely showing a manuscript or a picture was no publication. No case has ever decided that the author of a dramatic piece had a right at common law to prevent its representation on the stage. Then, as to the statutes, the right is plain and well defined. The 3 & 4 W. 4, c. 15, which professes to be an extension of the 54 G. 3, c. 156, gives the author of a dramatic piece the sole liberty of representing or causing it to be represented at any place of dramatic entertainment: and the 20th section of the 5 & 6 Vict. c. 45 extends the provisions of that act to musical compositions, and applies
*765] the provisions as to *copyright in books to dramatic pieces.(*a*) The question is whether that which is here charged in the second count is an infringement of the plaintiff's copyright in the novel. It is submitted that it is not. *Cur. adv. vult.*

(*a*) See Russell *v.* Smith, 12 Q. B. 217 (E. C. L. R. vol. 64).

WILLIAMS, J., now delivered the judgment of the court:(a)—

The second count of the declaration in this case alleged that the plaintiff was the duly registered proprietor of the copyright in a certain registered book, viz. a tale or novel or story intituled "It is never too late to mend," and complained that the defendant, without the plaintiff's consent, dramatized the said novel, and caused it to be publicly represented and performed as a drama at the Grecian Theatre, for profit, and thereby the sale of the book was injured, &c.

To this count there was a demurrer: and it was insisted on the part of the defendant that representing the incidents of a published novel in a dramatic form upon the stage, although done publicly and for profit, is not an infringement of the plaintiff's copyright therein: and we are of opinion that the defendant's contention is correct.

The right claimed by the plaintiff was twofold. First, he contended that his statutable right was infringed by the act of the defendant. It was held, however, in the case of Coleman *v.* Wathen, 5 T. R. 245, that representing a public dramatic piece of the plaintiff's upon the stage was not a publication within the meaning of the 8 Anne, c. 19, so as to subject the *defendant to the penalty imposed by the statute. [*766
And the 2d section of the 5 & 6 Vict. c. 45, defining "copyright" to mean "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied," seems to furnish a complete answer to the plaintiff's claim under the statute. Nor, indeed, did he much rely on it; his main reliance was placed upon the general ground, that, even if his statutable right had not been infringed, yet that, as an author, he had a copyright at common law, concurrently with, but more extensive than, his right under the statute; and that such common law right had been invaded by the act of the defendant.

Now, it is not necessary, in order to decide the present case, to consider the question upon which so much learning has been exhausted, viz. whether anterior to the statute of Anne there existed a copyright at common law in published books more extensive in its nature and duration than the right conferred or expressed by that statute. There can, we think, be no doubt that the weight of authority in the time of Lord Mansfield was in favour of the existence of such a right; although the doctrine has found less favour in more modern times: but the continued existence of any such right after the passing of the statute of Anne was distinctly denied by the majority of the judges in the celebrated case of Donaldson *v.* Beckett, 4 Burr. 2408, 2 Bro. P. C. 129: and the case itself expressly decides that no such right exists after the expiration of the period prescribed by that act.

The question, therefore, seems narrowed to this, namely, whether, the statute of Anne having confessedly put an end to such a right (if it ever existed) after the period it prescribes, has yet preserved it during the currency of such period. That it has done *so is a proposition [*767
which we think it difficult for the plaintiff to maintain. That a common law right of action attaches upon an invasion of the copyright created by statute, was decided in the case of Beckford *v.* Hood, 7 T. R. 620, and followed in several other cases. But we are not aware of any

(a) The judges present at the argument were Erle, C. J., Williams, J., and Keating, J.; Willes, J., being engaged in the Divorce Court.

case, since Millar v. Taylor, 4 Burr. 2303, was overruled by the House of Lords, which decides or recognises that an author of a published work has any other than the statutable copyright therein.

In the case of Murray v. Elliston, 5 B. & Ald. 657 (E. C. L. R. vol. 7), (before the 3 & 4 W. 4, c. 15), Lord Byron's tragedy of Marino Faliero, the copyright in which belonged to the plaintiff, had been abridged by curtailing the dialogue and soliloquies, and publicly acted and represented in that form by the defendant at Drury Lane Theatre for profit,—the advertisements describing it as Lord Byron's tragedy: a bill for an injunction having been filed, a case was sent for the opinion of the Court of Queen's Bench, whether the plaintiff could maintain an action against the defendant under the circumstances. The argument for the plaintiff there was put upon the same ground as in the present case: but the court certified that no action would lie,—a decision which appears in point against the plaintiff upon this record.

That much might be urged in favour of the common law right, if the question were res integra, cannot be doubted by any one who has read the learned judgments of the majority of the court in Millar v. Taylor, and (on the part of my Brother Keating and myself, I must be allowed to add) of Mr. Justice Erle in the case of Jefferys v. Boosey, 4 House of Lords Cases 876. But it was the opinion of a large majority of the judges and law lords in that case, that the time had passed when the
*768] question was open to discussion, and that it *must now be considered to be settled that copyright in a published work only exists by statute.

The learned counsel for the plaintiff in his argument cited a case of Turner v. Robinson, 10 Irish Chan. Rep. 121 (on appeal, p. 510), in which it was supposed the Master of the Rolls in Ireland had taken a view favourable to the plaintiff's claim in the present case. Upon looking to the report, however, it will be found that the opinion of that learned judge is directly opposed to such a claim. In that case, the plaintiff had applied for an injunction to prevent the defendant from pirating an original picture of the death of Chatterton, of which the plaintiff was proprietor, by means of stereoscopic apparatus. The Master of the Rolls, being of opinion, upon the facts, that there had been no publication of the picture, and that the imitation was a piracy, granted the injunction: but his opinion upon the point involved in the claim of the plaintiff upon this record was thus expressed. "It is not necessary," said that learned judge, "to go through the authorities collected in the cases to which I have referred,(a) as I apprehend it is clear that by the common law copyright or protection exists in favour of works of literature, art, or science, to this limited extent only, that, while they remain unpublished, no person can pirate them, but that, after publication, they are by common law unprotected. There has been much difference of opinion on this subject among the judges in England: but the law is now considered to be as I have stated it."

The opinion of the Master of the Rolls in Ireland may therefore be added to the weight of authority in this country in favour of the posi-
*769] tion that copyright or *protection to works of literature after they have been published, exists only by statute.

(a) Prince Albert v. Strange, 1 M'N & G. 25, 1 Hall & Twells 1; Jeffreys v. Boosey, 4 House of Lords Cases 815.

In our opinion the defendant is entitled to the judgment of the court upon this demurrer. Judgment for the defendant.

The issues of fact raised in the foregoing case afterwards came on for trial at the sittings in Middlesex after Easter Term, 1861, when a verdict was found for the plaintiff, subject to the opinion of the court on a case stated. This set forth in substance, that the plaintiff was the duly registered author and proprietor of a play entitled "Gold," and of the copyright therein. Subsequently he turned the play into a novel called "Never too late to Mend," of which he registered himself the author and proprietor. The novel contained in substance the same incidents, characters, and language as his play upon which it was founded. The defendant's son dramatized the novel, calling his work "Never too late to Mend," and in so doing took many of the characters and incidents, and much of the dialogue of the plaintiff's novel. The consequence was, that many parts of the drama, "Never too late to Mend," were the same as the corresponding parts of the plaintiff's drama, "Gold;" but he so composed his drama from the plaintiff's novel without having seen or otherwise known of his drama "Gold;" consequently he took nothing directly therefrom. The drama thus composed by the plaintiff's son, the defendant represented at his theatre. It was held that as the defendant's son had used, and the defendant had represented, whether knowingly or not, a considerable portion of the plaintiff's play, the defendant was liable for an infringement on the plaintiff's stage copyright in the latter: Reade *v.* Conquest, 5 Law T. N. S. 677. Whether the defendant's son, if he *published* his drama, would infringe the *book* copyright in his novel or drama, was not decided; though it was said to be "clear that he could not in that case defend himself on the ground that he was the author of the parts he copied;" if he could be excused it would be "under some of the rules relating to literary property, and the power of abridging or taking extracts therefrom, and so:" Id. 680.

The case of Wheaton *v.* Peters, 8 Peters 591 (see Bartlett *v.* Callender, 5 McLean 32), must be taken to have settled that there is now no copyright in the United States, as to published works, except under the statute. This being so, the course of the English decisions has been substantially followed. It is admitted or decided that a *bonâ fide* abridgment, by which is meant a "substantial condensation of materials and intellectual labour therein, not merely a selection, or a new arrangement," is not an infringement: Folsom *v.* Marsh, 2 Story 100; Story's Executors *v.* Holcombe, 4 McLean 306; Gray *v.* Russell, 1 Story 11; Stowe *v.* Thomas, 2 Wall. Jr., 547. See, however, the observations in an article on this subject in 3 Am. Law Reg. 129. And in Stowe *v.* Thomas, ut supra, it was expressly held that a prose translation into another language of a novel, of which the author had herself caused to be made and copyrighted a translation into that language, was nevertheless no breach of the copyright in the original.

See a very exhaustive discussion on the subject of copyright in dramatic compositions, in the opinion of Judge Cadwalader in Keene *v.* Wheatley, 9 Am. L. Reg. 33.

ALFRED CHAPMAN *v.* CALLIS. *Feb.* 8.

On the 4th of June, the plaintiff wrote to one T. C. as follows,—"I agree to take over the quarter of the ship Conrad on account of your debt to me, it being understood between us that I take delivery from the discharge of the cargo she has now on board after her arrival at S., all liabilities, &c., after being discharged to belong to me."

T. C. subsequently made an arrangement with his creditors, which was embodied in the following memorandum,—"July 14, 1858. We the undersigned agree to purchase the ships in the annexed statement, at the prices there put down, in the proportions set down opposite to our names, it being understood as part of this agreement that the debts owing by you to us as annexed be taken to their full amount in payment or part payment of the said purchases."

This memorandum was signed by the plaintiff as purchaser of sixteen sixty-fourths of the Conrad for 774*l.* on account of his debt of 810*l.* T. C. executed a bill of sale of the shares to the plaintiff on the 14th of September, which was registered on the 18th.

On the 30th of September, the defendant entered into the following contract with the plaintiff, —"I have this day bought from you sixteen sixty-fourth shares of the barque Conrad, now registered in your name at the custom-house, for the sum of 700*l.* and *all liabilities* or profits *on the said shares from the time of your purchase from Mr. T. C. for which you are liable as owner in any way*, or entitled to if there be any profits or balance in your favour. It is understood and agreed that the said liabilities, if any, are to be assumed and paid by me over and above the aforesaid sum of 700*l.*; and if, on the other hand, there is any balance or profits coming to you on the said shares, the same is to belong to me, and I am to receive the same for my own private benefit."

The terms of this agreement were afterwards embodied in a bill of sale, which was registered on the 15th of November.

The ship's husband having incurred certain debts for necessaries supplied to the ship between the 31st of July and the 8th of August, the plaintiff paid the amount, and sued the defendant, who it appeared had notice of the memorandum of the 14th of July, but not of the letter of the 4th of June:—Held, that the plaintiff was not entitled to recover, inasmuch as there was no evidence to show that he had incurred any legal liability to T. C. in respect of the goods so supplied.

Whether the plaintiff was precluded by the 55th section of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, from suing upon the agreement of the 30th of September,—*quære?*

THE first count of the declaration stated that the plaintiff sold to the defendant, and the defendant bought from the plaintiff, sixteen sixty-
*770] fourth parts *or shares of the barque Conrad, at or for the price or sum of 700*l.*, payable by the defendant to the plaintiff for the same at the time and in the manner then agreed upon by and between them, and upon the terms, among other things, that the defendants should be entitled to all the profits, if any, and should bear and pay all the liabilities, on and in respect of the said parts or shares to which the plaintiff was or should be entitled or liable as owner thereof, from the time when the plaintiff had purchased the said parts or shares from Thomas Chapman, and that the said liabilities, if any, should be assumed and paid by the defendant over and above the sum of 700*l.*: Averment, that certain liabilities of the plaintiff of and in respect of the said parts or shares within the true intent and meaning of the said agreement, amounting to a large sum of money, arose and accrued before suit; and that, although all conditions precedent were fulfilled, and everything happened, and all times elapsed, necessary to entitle the plaintiff to have the said liabilities assumed and paid by the defendant, and to maintain this action for the breach of the said agreement by the defendant thereinafter mentioned, yet the defendant had not assumed or paid the said liabilities, or any part thereof; and that, by reason thereof, the plaintiff had been obliged to pay and discharge, and had paid and discharged them, to a large amount, to wit, 39*l.* 14*s.* 11*d.*

There was also a count for money paid, and a count for money found due upon accounts stated.

The defendant pleaded,—first, to the first count, a traverse of the sale to him of the shares in the said barque upon the terms in that count alleged,—secondly, to the first count, that no such liabilities of the plaintiff on and in respect of the said shares arose or accrued from the time when the plaintiff had *purchased the said shares from the said Thomas Chapman,—thirdly, to the first count, a denial of the breach of the agreement,—fourthly, to the residue of the declaration, never indebted: whereupon issue was joined. [*771

The cause was tried before Martin, B., at the Liverpool Summer Assizes, 1860, when the following facts appeared in evidence:—One Thomas Chapman being possessed of thirty-two sixty-fourth shares of a vessel called the Conrad, an arrangement was in June, 1858, entered into between him and the plaintiff for the purchase by the latter of sixteen sixty-fourth shares, on account of a debt owing to the plaintiff from Thomas Chapman. The terms of this arrangement were embodied in a letter addressed by the plaintiff to Thomas Chapman, as follows:—

"June 4th, 1858.

"My dear Sir,—I agree to take over the quarter of the ship Conrad on account of your debt to me, it being understood between us, that, as the ship will soon be off her present voyage, I take delivery from the discharge of the cargo she has now on board after her arrival at Swansea, as she may stand clear of all debts and assets; all liabilities, debits, or assets after being discharged, to belong to me. I am sorry to hear that you think she will lose money on her present voyage.

"Alfred Chapman."

A general arrangement shortly afterwards took place between Thomas Chapman and his creditors, who all signed a document to the following effect:—

"Liverpool, July 14th, 1858.

"Mr. Thomas Chapman.

"Sir,—We the undersigned agree to purchase the ships in the annexed statement at the prices there put *down, in the proportions set down opposite to our names: it being understood as part of this agreement, that the debts owing by you to us as annexed be taken to their full amount in payment or part payment of the said purchases." [*772

The plaintiff signed the above memorandum as one of the creditors: and by the statement annexed it appeared that he signed as agreeing to purchase sixteen sixty-fourths of the Conrad, at 9*l.* per ton, equal to 774*l.*, his debt being stated at 810*l.* The bill of sale of such sixteen sixty-fourths of the Conrad from Thomas Chapman to the plaintiff was executed on the 14th of September, 1858, and registered on the 18th.

On the 30th of September, 1858, the defendant agreed to purchase the plaintiff's interest in the Conrad; the terms of that agreement are contained in the following memorandum:—

"Liverpool, September 30, 1858.

"To Mr. Alfred Chapman.

"Sir,—I have this day bought from you sixteen sixty-fourth shares

of the barque Conrad, 328, now registered in your name at the Custom-House, for the sum of 700*l.* and all liabilities or profits on the said shares from the time of your purchase from Mr. Thomas Chapman, for which you are liable as owner in any way, or entitled to if there be any profits or balance in your favour. It is understood and agreed that the said liabilities, if any, are to be assumed and paid by me over and above the aforesaid sum of 700*l.*: and if, on the other hand, there is any balance or profits coming to you on the said shares, the same is to belong to me, and I am to receive the same for my own private benefit. Payment by my acceptance of your draft at six months' date, the same to be renewed if I require it for a further term of six months, adding interest at the rate of 5*l.* per cent. per annum on the renewal, and, *773] *if required, a further renewal of one-half (say 350*l.*) for six months. The bill of sale to be held by Mr. Thomas Chapman as security until my acceptance is paid. "CHARLES CALLIS."

The plaintiff at the same time executed a bill of sale of these sixteen sixty-fourth shares to the defendant, in the ordinary form, and sent it to Thomas Chapman. This bill of sale was registered on the 15th of November, 1859.

The Conrad discharged her cargo at Swansea on the 30th of July, 1858. The liabilities in respect of which this action was brought, were for stores supplied to the ship between the 31st of July, 1858, and the 9th of August,—the plaintiff having paid to the executrix of Thomas Chapman (who had died in the mean time) 39*l.* 14*s.* 11*d.*, the proportion due upon the sixteen sixty-fourths. The defendant was aware of the memorandum of agreement signed by the creditors of Thomas Chapman on the 14th of July, 1858; but there was no evidence that he had any knowledge of the plaintiff's letter of the 4th of June, 1858.

On the part of the defendant it was objected that the memorandum of the 30th of September, 1858, was inadmissible in evidence and invalid in law, for that the whole terms of the contract must be looked for in the subsequent bill of sale; and that, at all events, the defendant was entitled to a verdict on the second issue.

The learned judge, without expressing any opinion, directed a verdict to be entered for the plaintiff for the sum claimed, reserving leave to the defendant to move.

Brett, accordingly, in Michaelmas Term last, obtained a rule nisi to *774] enter a verdict for the defendant, *or a nonsuit, on the grounds, —"first, that there was no evidence to support the first plea, inasmuch as the evidence relied on for that purpose was improperly admitted, or, if properly admitted, was void by reason of the enactments of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104,—secondly, because the second issue ought to have been entered for the defendant, inasmuch as either there was no legal evidence of any purchase, or the true date of the purchase by the plaintiff from Thomas Chapman was according to law on the 14th of September, 1858, at the earliest, and because no liability was shown to have fallen on the plaintiff after the purchase by him of the shares in the ship Conrad from Thomas Chapman." He referred to Duncan *v.* Tindall, 13 C. B. 258, and The Liverpool Borough Bank *v.* Turner, 6 Jurist, N. S. 935, 29 Law J., Ch. 827.

C. A. Russell now showed cause.—The memorandum of the 30th of September, 1858, was clearly admissible in evidence upon the principle acted upon in Harris *v.* Rickett, 4 Hurlst & N. 1.† There, a trader obtained from the defendant an advance of 200*l.* for which he verbally agreed to give a bill of sale of all his property, if called upon to do so. On receiving the money, he gave to the defendant a promissory note for 200*l.*, a memorandum of agreement to assign some property expectant on the death of his wife's father, together with a policy of insurance, and also another memorandum of agreement to pay 10*l.* yearly as bonus. At a later period, on being requested, he executed a bill of sale of all his property to the defendant. The trader having become bankrupt, his assignees brought trover for the goods which the defendant had seized under the bill of sale; and it was held that evidence of the original verbal agreement was admissible, inasmuch *as the subsequent written agreement did not contain, and was not intended to contain, the whole agreement between the parties. [*775 [WILLES, J.—In Myers *v.* Willis, 17 C. B. 77 (E. C. L. R. vol. 84), where it was sought to charge a party whose name appeared on the register as owner of the ship for contracts entered into on behalf of the ship by the master, a contemporaneous letter from the grantor of the bill of sale showing that it was only given as a collateral security for a loan, was received as evidence.] Then it is said that the memorandum was void by reason of the enactments of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104; and the cases of Duncan *v.* Tindall and The Liverpool Borough Bank *v.* Turner were relied upon. Duncan *v.* Tindall,—where it was held that an action will not lie for the breach of an *executory* contract for the sale or transfer of a ship, unless the contract contains a recital of the certificate of registry,—was decided upon the 8 & 9 Vict. c. 89, s. 34, the language of which differs essentially from that of the 55th section of the statute now in force, 17 & 18 Vict. c. 104. And The Liverpool Borough Bank *v.* Turner merely decides that a court of equity will not give effect to an unregistered contract to assign a ship. This is the case of a collateral contract. In Duncan *v.* Tindall, Maule, J., says,—13 C. B. 270 (E. C. L. R. vol. 76),—"Before the passing of this act (the 8 & 9 Vict. c. 89), there had been a statute of 34 G. 3, c. 68, in force, the 14th section of which contained words expressly including *executory contracts*, and providing that they should be void to all intents and purposes, unless made in the prescribed form. Such language as that might naturally lead to a doubt, or an opinion, that, whatever else besides the transfer of the property in a ship might be contemplated by the contract, the want of a recital of the certificate of registry would render the whole contract void, even for a collateral purpose, such as *the mortgage of the ship, or a covenant to pay money. This difficulty is avoided by the subsequent and the [*776 existing acts. The provision now in force has all the effect of the 34 G. 3, c. 68, s. 14, as to avoiding executory agreements for the transfer of a ship; and we may engraft the exception I have mentioned, as regards their validity for collateral purposes, without limiting that effect so far as the present action is concerned: and, although the former statutes were not interpreted as invalidating every stipulation of a collateral nature contained in an instrument invalid as a transfer of a ship, yet the literal meaning of the words of the 34 G. 3, c. 68, s. 14, which

were omitted from the subsequent acts, might have that effect." Besides, the collateral agreement could not have been inserted in the bill of sale, since, by the 18 & 19 Vict. c. 91, s. 11, it is provided, that, "in any case in which any bill of sale, mortgage, or other instrument for the disposal or transfer of any ship or any share or shares therein, or of any interest therein, is made in any form or contains any particulars other than the form and particulars prescribed and approved for the purpose by or in pursuance of the Merchant Shipping Act, 1854, no registrar shall be required to record the same without the express direction of the commissioners of Her Majesty's customs." The second branch of the rule depends upon the construction of the contract of the 30th of September. By that letter the defendant agrees to take upon himself all liabilities on the shares from the time of the plaintiff's purchase from Thomas Chapman, for which the defendant was liable as owner in any way. The construction contended for on the part of the defendant, is, that that refers to a liability as *legal* owner, and consequently, that, inasmuch as he could not legally be the owner of the shares until the transfer was registered, viz. on the 14th of July, he *777] *could not be liable in respect of goods supplied to the ship prior to that date. Looking, however, as the court must do, at all the surrounding circumstances, it is submitted that that construction does not carry out the obvious intention of the parties, which was that the defendant should place himself to all intents and purposes in the same position with respect to the ship's debts as the plaintiff had stood in. As between the plaintiff and Thomas Chapman, it is manifest that the liability which the former incurred, was, a liability to all charges on the ship from the 4th of June, the day on which he had agreed to buy the shares.

Brett, in support of the rule.—There was no evidence to support the first issue. The consideration for the plaintiff's promise was the memorandum of the 30th of September, 1858, which purported to be a sale of certain shares in a ship. Now, the registered bill of sale is the only legal evidence of the transfer of a ship; an executory contract for the sale cannot be enforced either at law or in equity. The former statutes, it is true,—26 G. 3, c. 60, s. 17, 34 G. 3, c. 68, s. 14, 4 G. 4, c. 41, s. 29, 6 G. 4, c. 110, s. 31, 3 & 4 W. 4, c. 55, s. 31, and 8 & 9 Vict. c. 89, s. 34,—contained negative words which are not found in the corresponding enactment, s. 55, of the 17 & 18 Vict. c. 104. But, these acts being passed for the public benefit, and the recent statute having been framed with a view to the consolidation of the existing law, it must be read as if it contained the negative words. The 16th section of the 26 G. 3, c. 60, recited that "the provisions made in and by the recited act of 7 & 8 W. 3, c. 22, touching the endorsement on certificates of registry, in case of any alteration of the property in any ship or vessel, in the same port to which the ship or vessel belongs, had been found insuffi- *778] cient;" and s. 17 enacted, "that, when *and so often as the property in any ship or vessel belonging to any of His Majesty's subjects should be transferred to any other or others of His Majesty's subjects, in whole or in part, the certificate of the registry of such ship or vessel should be truly and accurately recited in words at length in the bill or other instrument of sale thereof, and that *otherwise such bill of sale should be utterly null and void to all intents and purposes.*"

This was followed by the 34 G. 3, c. 68, the 14th section of which, reciting the 17th section of the former act, enacted "*that no transfer, contract, or agreement for transfer of property in any ship* or vessel made or intended to be made after Jan. 1, 1795, *should be valid or effectual for any purpose whatsoever, either in law or in equity, unless such transfer or contract or agreement for transfer of property in such ship or vessel should be made by bill of sale or instrument in writing containing such recital as prescribed by the said recited act.*" Upon this statute it was decided in Biddell *v.* Leeder, 1 B. & C. 327 (E. C. L. R. vol. 8), 2 D. & R. 499 (E. C. L. R. vol. 16), that an executory agreement to transfer a share of a vessel was void, unless it contained a recital of the certificate of registry. The next statute is the 4 G. 4, c. 41, the 29th section of which enacted, "that, when and so often as the property in any ship or vessel, or any part thereof, belonging to any of His Majesty's subjects, shall, after registry thereof, be sold to any other or others of His Majesty's subjects, the same shall be transferred by bill of sale or other instrument in writing containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof, *otherwise such transfer shall not be valid or effectual for any purpose whatever either at law or in equity.*" The former acts were repealed, and the 29th section omits all mention of "contracts or agreements for the transfer," &c. Then came the 6 G. 4, c. 110, *the 2d section of which gave a form of certificate of registry, the 16th a certificate of survey, and the 25th a new certificate, [*779 viz. the builder's; and the 31st in terms re-enacted the 29th section of the 4 G. 4, c. 41. Next came the 3 & 4 W. 4, c. 55, the 2d, 15th, 25th, and 31st sections of which corresponded with those last mentioned. Boyson *v.* Gibson, 4 C. B. 121 (E. C. L. R. vol. 56), was a decision under this statute. There, a British ship registered under that act was conveyed by A., the registered owner, to B., for a valuable consideration, by a bill of sale executed before, but not registered until after, the bankruptcy of A.: and it was held that B. thereby acquired no property in the ship, but that it passed to A.'s assignees,—the effect of the statute being, that, until registration, every disposition by the act of the vendor, or of the law, is as ineffectual as if the unregistered deed had not existed, and is not defeated by subsequent registration, whether such intermediate disposition be one which requires registration, and is registered, or one which does not require registration. [BYLES, J.—That was an attempted conveyance in violation of the statute.] Then comes the 8 & 9 Vict. c. 89, the prohibitory section of which, s. 34, was the same as the 4 G. 4, c. 41, s. 29. The first of these acts in terms prohibits executory contracts: then comes a series of statutes omitting those prohibitory words. [BYLES, J.—But substituting a new expression, "shall not be valid or effectual for any purpose whatever at law or in equity." *Russell* called attention to the 37th section of the 8 & 9 Vict. c. 89, (*a*) a *provision which is not found in the 17 & 18 Vict. c. [*780 104.] In Hughes *v.* Morris, 2 De Gex, M'N. & G. 349, it was

(*a*) "That no bill of sale or other instrument in writing shall be valid and effectual to pass the property in any ship or vessel, or in any share thereof, or for any other purpose, until such bill of sale or other instrument in writing shall have been produced to the collector and comptroller of the port at which such ship or vessel is already registered, or to the collector and comptroller of any other port at which she is about to be registered de novo, as the case may be, nor until such collector and comptroller respectively shall have entered in the book of such

held that a contract for the sale of shares in a British vessel, not reciting the certificate of registry, cannot be enforced in equity. Lord Justice Knight Bruce there says: "What the legislature had in view was not merely, as I apprehend, the passing or not passing of what we call the legal estate, but substantially this,—that, whenever property in a vessel should be changed, it should be changed in a particular way. Now, whether there is a sale, or a contract for a sale, can make no difference. A contract for a sale is, in the view of a court of equity, a sale; whether an actual transfer is made is of no consequence, if a transfer is agreed to be made, because that which is agreed to be done is in the view of a court of equity for many purposes held to be done. If the argument were to prevail, that what this act directs with respect to a sale or transfer, does not extend to a contract for sale, or a contract to transfer, we should in effect, as it seems to me, be repealing so much of the statute: because the legal title might remain unchanged upon the registry, and the equitable interest might be continually the subject of *781] transmission from person to person, in a manner *utterly contravening the provisions of the act of parliament. A court of equity is bound to follow the law where the public interest is concerned." In M'Calmont v. Rankin, 2 De Gex, M'N. & G. 403, it was held,—the 8 & 9 Vict. c. 89 being then in force,—that the provisions of the ship registry acts apply equally to *contracts* as to *sales*, and that the whole frame of those acts negatives any equity resulting out of the doctrine of notice; consequently, that an unregistered agreement with the registered owner of a ship which the owner subsequently transferred for value to another person, who had notice of the agreement, could not be enforced either against the ship or its proceeds. The Lord Chancellor (Lord St. Leonards) there says: "I think it is perfectly clear that the acts now existing do relate to contracts, because they relate to every disposition: 'that, when and so often as the property in any ship or vessel,' &c.; otherwise 'the said transfer shall not be valid or effectual for any purpose whatever, either in law or in equity.' What can be plainer? What is the subject of sale? A chattel, a ship. No particular form of words is necessary for the transfer. A bought and sold note, any instrument which shows that one person parts with and that another person is to acquire the property, will suffice. The words 'I contract with you to sell and let you have the ship Miracle at 4000*l.*, to be paid to-morrow, or to be paid down,' constitute a perfectly good transfer of the ship, provided the terms of the ship registry acts are complied with. But, to suppose that contracts are left out of the operation of the existing acts, appears to me perfectly irreconcileable with the language of their provisions: the words are, 'that, when and so often as the property in any ship, &c., shall be sold.' Is not the property in a ship sold by contract? The plaintiff's construction, however, *782] might lead to such a *construction as this. There might be a contract, and an actual transfer, with the consideration paid, but invalid only by reason of a non-compliance with some of the forms pre-

registry in the one case, and in the book of such registry de novo, after all the requisites of law for such registry de novo shall have been duly complied with, in the other case, the name, residence, and description of the vendor or mortgagor, or of each vendor or mortgagor, if more than one, the number of shares transferred, the name, residence, and description of the purchaser or mortgagee, or of each purchaser or mortgagee, if more than one, and the date of the bill of sale or other instrument, and of the production of it, &c."

scribed by the statutes; although the statutes say such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity, yet, according to the plaintiff's contention, the contract is to operate in equity as a transfer, and to give a right to relief. I apprehend the true construction of the statutes of the 3 & 4 W. 4, c. 55, and 8 & 9 Vict. c. 89, to be, that no contract can be valid unless it complies with the conditions prescribed in those acts. The legislature, as it appears to me, did not by the recent acts abolish or repeal the law as regards the regulation of contracts, but it continued in a general form the same regulations as to contracts which had theretofore been imposed; and I think those general terms are sufficient, so as to require that every contract shall be registered in compliance with the acts." [BYLES, J.—When were the words "either at law or in equity" first introduced?] They are found for the first time in the 4 G. 4, c. 41, s. 29, which drops the words "contract or agreement for transfer," which were contained in the 34 G. 3, c. 68, s. 14. This court in Duncan *v.* Tindall, 13 C. B. 258 (E. C. L. R. vol. 76), emphatically adopted the construction put upon the 8 & 9 Vict. c. 89, s. 34, by Lord Justice Knight Bruce in Hughes *v.* Morris, 2 De Gex, M'N. & G. 349. Thus stood the course of legislation and of the decisions down to the time of the passing of the Merchant Shipping Act, 1854. The 55th section of that statute enacts that "a registered ship or any share therein, when disposed of to persons qualified to be owners of British ships, *shall be transferred by bill of sale*," omitting the prohibitory words; "and such bill of sale shall contain such description of the ship as is *contained in the certificate of the surveyor, or such other description as may be sufficient to identify the ship to the satisfaction of the registrar, and shall be in the form," &c. And the 57th section enacts that "every bill of sale for the transfer of any registered ship, or of any share therein, when duly executed, shall be produced to the registrar of the port at which the ship is registered, together with the declaration hereinbefore (s. 38) required to be made by a transferree; and the registrar shall thereupon enter in the register-book the name of the transferree as owner of the ship or share comprised in such bill of sale, and shall endorse on the bill of sale the fact of such entry having been made, with the date and hour thereof; and all bills of sale of any ship or shares in a ship shall be entered in the register-book in the order of their production to the registrar." In The Liverpool Borough Bank *v.* Turner, 29 Law J., Ch. 827, it was held by Vice-Chancellor Wood that a court of equity can give no effect to an unregistered contract to assign a ship as a security for money due. After referring to the earlier statutes and to the language of Lord Justice Knight Bruce in Hughes *v.* Morris, and of Lord St. Leonards in M'Calmont *v.* Rankin, his Honor says: "Now, the difficulty, and a very great one I have found it to be, I confess, in considering this act of parliament, is, whether or not the act of parliament, having omitted those prohibitory words 'that it shall be of no effect either in law or in equity,' is to be taken as mandatory and not merely directory. I apprehend, that, if an act of parliament says that a contract shall be carried into effect in a given way, and such enactment is not by way of direction merely, then the additional words, 'that it shall not be of any effect either in law or in equity,' are superfluous, because, if the act says that is the way all property shall be acquired, you

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*784] *must comply with those provisions, in order to acquire the property: the property is to be given in that mode, and that mode only." The memorandum of the 30th of September, therefore, being a contract for the purchase and sale of a ship unaccompanied by the formalities prescribed by the statute, is altogether void. Then, the defendant is at all events entitled to a verdict on the second issue. The contract contained in the memorandum of the 30th of September was, to indemnify the plaintiff from any liability he might come under as owner from the time of his purchase from Thomas Chapman. At what period did the plaintiff become liable as owner? Clearly not from the 4th of June. The letter of that date was at most a preliminary contract between the plaintiff and Thomas Chapman. The defendant was no party to it; nor had he any notice of its existence: nor did the plaintiff become owner of the Conrad under that contract. In truth, that letter was never acted upon: for, on the 14th of July, the plaintiff entered into a new and a different contract with Thomas Chapman, under which he ultimately became the purchaser of the ship. Upon one or other of these issues the defendant is manifestly entitled to succeed.

WILLIAMS, J.—I am of opinion that this rule should be made absolute. The action is brought upon an agreement dated the 30th of September, 1858, and made between the plaintiff and the defendant, in which it is recited that the defendant has bought from the plaintiff certain shares in the barque Conrad, then registered in the plaintiff's name at the Custom-House, for the sum of 700*l.*, "and all liabilities or profits on the said shares from the time of your purchase from Mr. Thomas Chapman (14th July, 1858), for which you are liable as owner in any *785] way or entitled to if there *be any profits or balance in your favour." The agreement then goes on to say that it was understood and agreed that the said liabilities, if any, were to be assumed and paid by the defendant over and above the aforesaid sum of 700*l.*; and that if, on the other hand, there were any balance or profits coming to the plaintiff on the shares, the same was to belong to the defendant, and he was to receive the same for his own private benefit. Upon that agreement the plaintiff now seeks to recover from the defendant certain expenses incurred by the ship's husband between the 31st of July and the 9th of August, 1858, which had been paid by the plaintiff. Two objections have been urged against the plaintiff's right to recover these expenses. Mr. *Brett* in the first place insisted that the contract of the 30th of September, 1858, was altogether void by reason of the operation of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, which not only makes void all present transfers of ships unless accompanied by certain formalities which are wanting here, but also all executory contracts for the purchase of vessels; and therefore, the only consideration for the contract here being the sale of the Conrad, and those formalities not having been observed, the contract was incapable of being enforced. On the other side it was insisted, upon this branch of the argument, that, the 11th section of the 18 & 19 Vict. c. 91, having made it impossible to incorporate a collateral agreement like that in question with a bill of sale, this was the only way in which any collateral contract can be entered into with the vendor of a ship, and that the transaction in effect amounted to this, that the contract was a contract that the defendant would pay the liabilities referred to in case there

should ultimately be a valid sale of the ship. It is not necessary, however, for us to decide that point, *because we think the second point urged by Mr. *Brett* affords an answer to the action. That [*786 point is this, that, in order to sustain his claim, the plaintiff must show that the liabilities in respect of which he seeks to charge the defendant were liabilities which accrued after the purchase of the ship from Thomas Chapman, and also liabilities which were chargeable on the present plaintiff as owner. As to the first head of this objection, viz. that the plaintiff could not be considered as the owner of the shares until the bill of sale had been executed, I should have felt inclined to decide against the defendant, because I think, in construing the agreement of the 30th of September, it may fairly be understood that the words "from the time of your purchase from Mr. Thomas Chapman," do not point to the time when the property in the shares passed to the plaintiff by a strict legal purchase and sale, but to the time when in ordinary parlance the purchaser may be said to have entered into a contract to purchase them. But, assuming that we may carry back the time of purchase to the 14th of July, there is nothing in that agreement,—which was in effect an agreement entered into by the plaintiff with the other creditors of Thomas Chapman,—which subjects the plaintiff to any liability at all in respect of supplies to the ship. That letter differs materially from the letter of the 4th of June, in which it is stipulated that all liabilities, debits, or assets after the ship's discharge at Swansea should belong to the plaintiff. That document is not at all connected with the letter of the 14th of July: on the contrary, there is evidence on the face of it that the two are wholly disconnected. The letter of the 4th of June appears to relate to a transaction to which the plaintiff and Thomas Chapman alone were parties; whereas, the transaction of the 14th of July is an arrangement not only between the plaintiff and *Thomas Chapman, but also between Thomas Chapman and all his creditors generally. The letter of the 14th of July, then, [*787 being silent on the subject, I do not see what there is to show any liability on the part of the plaintiff, either by the express terms of the contract, or by reason of his having become the owner of the shares. He did not in fact become such owner until the execution of the bill of sale by which these shares were conveyed to him, viz. on the 14th of September, which was long after the expenses in question were incurred. I therefore think the plaintiff failed to show a liability which the defendant had contracted to bear, and consequently the rule to enter a nonsuit must be made absolute.

WILLES, J.—I also am of opinion that the rule should be made absolute. Upon the first point it is unnecessary to pronounce any opinion. I will merely observe that nothing I have heard has satisfied me that the contract of the 14th of July was void by reason of the 55th section of the Merchant Shipping Act, 1854. As to the second point, I am satisfied that the letter of the 4th of June ought not to be taken into account against the defendant in construing the contract of the 30th of September. When the defendant signed that letter, he was not aware of the existence of the letter of the 4th of June, or of its contents. Further, it appears to me not to be satisfactorily made out that the transfer of the 14th of September was anything more than a fulfilment of the bargain of the 14th of July. Probably, however, the first point

is the more sound one to rely on. The letter of the 14th of July does not contemplate the plaintiff's being liable for the supplies in question. We must look, therefore, to the terms of the document of the 30th of September. The liabilities which the defendant thereby undertakes to
*788] *pay are thus stated,—"all liabilities on the said shares from the time of your purchase from Mr. Thomas Chapman, for which you are liable *as owner* in any way." Now, it is plain that the plaintiff was not liable "as owner" in any way in respect of the expenses sought to be recovered in this action. In construing this agreement, I do not think the plaintiff is at liberty to contend that the purchase is to date from the first bargaining for the transfer, though an argument might have been raised on that if the letter of the 4th of June could have been referred to. That letter, however, is out of the question: the plaintiff must stand upon the agreement of the 30th of September. The plaintiff can only recover in respect of expenses for which he was liable as owner: and the expenses for which he is now sought to be charged were not incurred when he was owner. It is to be regretted that Mr. *Brett* did not put his best ground first.

KEATING, J.—I also am of opinion that the defendant is entitled to have the rule made absolute to enter a nonsuit. As to the first point presented by Mr. *Brett*, I will merely observe that his argument failed to convince me that this claim might not have been sued upon if it had been sustained by the evidence. But it seems to me that the argument fails, for the reasons given by my Brothers Williams and Willes. It is clear upon the evidence, that by no possible construction of the memorandum or letter of the 30th of September could the ownership be carried back further than the 14th of July; and that memorandum imports no such liability as will sustain the plaintiff's claim. I therefore think the defendant is entitled to succeed.

Rule absolute for a nonsuit.

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*789] *In re ANN AMELIA VAN UFFORD and Another.
Jan. 29.

The court will enlarge the time for returning a special commission for taking the acknowledgment of a married woman abroad, where it has been *duly* executed, but its return has been unavoidably delayed until after the return day therein named.

The court allowed a commission, with the certificate of acknowledgment and affidavit of verification, to be received and filed, notwithstanding the omission of the month in the jurat of the affidavit.

A SPECIAL commission was issued on the 8th of February, 1860, directed to four commissioners at Batavia, in the island of Java, directing them, or any two of them, to take the acknowledgments of Ann Amelia, wife of Ivan Quarles Van Ufford, Anthonia Theodora, the wife of Theodoor Van Hecking Colenbrander, both residing in the island of Java,—returnable on the 1st of December, 1860. The acknowledgments were duly taken by two of the commissioners at Batavia on the 13th of October, 1860: but, in the jurat of the affidavit verifying the certificate of acknowledgment in the case of Anthonia Theodora Colenbrander, a blank had inadvertently been left for the month: and the

commission was not returned to this country until the 19th of January, 1861.

C. Pollock, on a former day in this term, moved that the return of the commission be extended to the 31st of January instant, and that the commission, with the certificates of acknowledgment, and the affidavits respectively verifying the same, be received and filed among the records of the court, by the proper officer for that purpose, pursuant to the statute 3 & 4 W. 4, c. 74, notwithstanding the omission of the date (*a*) of the month in the jurat of the affidavit annexed to the certificate of the acknowledgment of Anthonia Theodora Colenbrander. He submitted, that, as the fixing the time for the return of the commission was the act of the court, and not the result of any requirement of the statute, it was competent to the court to extend it. [WILLIAMS, J.—We have frequently allowed the time for *returning the commission to be enlarged.(*b*)] The jurat of the affidavit of the commissioner verifying the certificate of Anthonia Theodora Colenbrander is as follows,—"Sworn at Batavia on the 13th day of , 1860." Both acknowledgments, however, appear to have been taken on the same day, and the jurats of the two affidavits will be found on inspection to have been evidently written at the same time. [*790

WILLIAMS, J.—You are in effect asking us to hold, that, in every case, an affidavit may be received the jurat of which omits the month.

ERLE, C. J.—I hardly think we are justified in receiving this as a valid document, the jurat being defective as to the month. I should, however, be desirous not to put the parties to the delay and expense of a new commission, provided the defect can be supplied by some explanatory affidavit showing that the requirements of the law have been really complied with,—that the affidavit must have been sworn on the 13th of October, 1860.

On a subsequent day, *Pollock* produced an affidavit stating, that, from the course of the post, and the postmarks on the envelope in which the documents were transmitted to this country, they must have been forwarded from Java previously to the 1st of December, 1860, and that they were received in London on the 19th of January, 1861; and that the deponent verily believed that the affidavit in question was *sworn on the 13th of October, 1860, and the month omitted by mistake and inadvertence. [*791

PER CURIAM.—Let the documents be received. Fiat.(*c*)

(*a*) Sic.

(*b*) See In re Darling, 2 C. B. 347 (E. C. L. R. vol. 52), where Tindal, C. J., says that this part of the motion is "mere matter of form." See also In re Anna Booth, 5 C. B. N. S. 540 (E. C. L. R. vol. 94).

(*c*) See the next case. And see In re Fagan, 5 C. B. 436 (E. C. L. R. vol. 57); In re Worthington, 5 C. B. 511; In re Bingle, 15 C. B. 449 (E. C. L. R. vol. 80); and In re Tierney, 15 C. B. 761.

In re MARY ANN CARTER. *Jan.* 31.

The court will not enlarge the time for returning a special commission for taking the acknowledgment of a married woman abroad, where it has been executed *after* the return day named therein.

MILWARD moved to enlarge the time for returning a commission which

had been directed to, amongst others, the judge of the circuit court of South Carolina, returnable on the 1st of October, 1860. In consequence of the absence of the judge on his official duties, and the death of another party, it was impossible to take the acknowledgment until after the expiration of the day named for the return of the commission. He referred to In re Anna Booth, 5 C. B. N. S. 540 (E. C. L. R. vol. 94), where it was held that the court will enlarge the time for returning a commission for taking the acknowledgment of a married woman, where, by reason of the remoteness of the residences of the parties, the time allowed has proved too short. The statute (3 & 4 W. 4, c. 74, s. 83) provides that the commission shall be made returnable "within such time, to be therein expressed, as the said court or judge shall think fit."

*792] [ERLE, C. J.—For anything that appears in the report of the case of In re Anna Booth, *the commission was *executed* in time.(*a*)] The time for the return is not the requirement of the statute. It is a mere direction contained in the rule of court: and the excuse here is ample,—the absence of the commissioner on the performance of a public official duty. There is a further objection,—

ERLE, C. J.—You have not got over the first objection. If commissioners are authorized to take an acknowledgment, and to return the commission on or before the 1st of October, and nothing is done by them until that day has gone by, their power is exhausted, and we could not afterwards enlarge the time for the return. We would willingly aid the parties if the practice of the court would warrant it: but we know of no precedent for it.

The rest of the court concurring, Rule refused.(*b*)

(*a*) On reference to the office, it is found that the commission issued on the 21st of December, 1857, and was originally made returnable on the 1st of September, 1858,—that the time for returning it was by rule of court extended to the 10th of February, 1859,—and that the certificate of the taking of the acknowledgment was dated the 24th of May, 1858.

(*b*) In re Ann Tierney, 15 C. B. 761 (E. C. L. R. vol. 80), the court refused to enlarge the time for returning the commission, the time for the return having expired, although the acknowledgment had been taken within the time.

*793] *In re MACQUEEN and THE NOTTINGHAM CALEDONIAN SOCIETY. *Jan.* 31.

It is competent to arbitrators under the Friendly Societies Act to decline to hear counsel. *Semble*, that all arbitrators have the like discretion.

A DISPUTE between a member of a friendly society called The Nottingham Caledonian Society and the managing members thereof respecting a claim on the sick fund, was, pursuant to the rules of the society, referred to three arbitrators. The claimant attended by counsel, but the arbitrators, though they expressed themselves willing to hear a speech, refused to allow the counsel to cross-examine the witnesses; whereupon the claimant withdrew, and the award was made in his absence, negativing his claim.

The claimant then applied to the judge of the Nottingham county court to set aside the award: but the judge refused to entertain the matter, saying he had no jurisdiction.

Yeatman now moved for a mandamus to compel the county court judge to hear the application.—He referred to the 18 & 19 Vict. c. 63, s. 40,(*a*) and submitted that the award was bad on the face of it, and therefore not binding: The Queen *v.* Grant, 14 Q. B. 43 (E. C. L. R. vol. 68). [ERLE, C. J.—You say that the arbitrators' refusal to *hear counsel is an infringement of the claimant's right.] Yes: [*794 the right is recognised in Whatley *v.* Morland, 2 Dowl. P. C. 249. In the Income Tax Acts there is an express provision for excluding counsel from attending before assessors. [ERLE, C. J.—The right of advocates to attend before magistrates was very fully discussed in the case of Collier *v.* Hicks, 2 B. & Ad. 663 (E. C. L. R. vol. 22), where Parke, J., says: "No person has a right to act as an advocate without the leave of the court, which must of necessity have the power of regulating its own proceedings in all cases where they are not already regulated by ancient usage. In the superior courts, by ancient usage, persons of a particular class are allowed to practise as advocates, and they could not lawfully be prevented; but justices of the peace, who are not bound by such usage, may exercise their discretion whether they will allow any and what persons to act as advocates before them." An arbitration under the Friendly Societies Act is a mode of proceeding not regulated by ancient usage. The observations of Lord Wensleydale apply with even more force to the case of a private arbitrator sitting in a private room.] It certainly can hardly be charged as corruption in the arbitrator that he refused to hear counsel; but, nevertheless, it may be a very unfair thing, and such misconduct or miscarriage as to entitle the complainant to treat the award as a nullity. If the matter had occurred in one of the superior courts, he would have been entitled as a matter of course to be heard by counsel. [ERLE, C. J.—You say that the interests of justice require that arbitrators acting under the Friendly Societies Act should be compellable to hear the parties by counsel. That is the ground of the argument.] The substance of the complaint is, the refusal of the arbitrator to allow the complainant to be represented by counsel.

*ERLE, C. J.—This is an application for a rule in the nature [*795 of a mandamus to the judge of the county court of Nottingham, to hear a dispute between a member of a friendly society and the managing body: and the ground for the application is, that the arbitrators have failed to determine the matter in dispute between the parties. The rules of the society contain a provision for the settlement of disputes by arbitration: and the 40th section of the 18 & 19 Vict. c. 63, enacts, that, where the rules provide for the determination of disputes by arbitration, the decision of the arbitrator shall be binding and conclusive on all parties, without appeal. A disputed claim having been referred, in accordance with the rules, the parties appeared before the

(*a*) Which enacts that "every dispute between any member or members of any society established under this act or any of the acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties, without appeal: Provided, that, where the rules of any society established under any of the acts hereby repealed shall have directed disputes to be referred to justices, such disputes shall from and after the 1st of August, 1855, be referred to and decided by the county court, as hereinafter (s. 41) mentioned."

arbitrators, and they have made an award. The complainant now insists that the decision of the arbitrators is void because they declined to allow him to be represented by counsel at the hearing; this, as it is contended, being such misconduct as to render the whole proceeding a nullity. There is nothing in the affidavit to raise a suspicion of partiality: the only charge is, that the arbitrators in their discretion thought fit to decide that the claimant had no *right* to introduce counsel. Mr. *Yeatman* puts it on the ground that it was an unfair exercise of discretion on the part of the arbitrators to refuse to allow the party the assistance of counsel; and he contends that the interests of justice require that the parties upon such an arbitration as this should be heard by counsel. I am of opinion that the argument fails. I am not aware of any authority for it; and none has been cited. As far as the interests of justice are concerned, I can foresee that there might be great failure of justice if counsel were allowed to interfere in all cases. The intention of the legislature is plainly expressed, that disputes of this
*796] sort should be terminated speedily and finally: *and, so far from the interests of justice being advanced by hearing counsel, I am inclined to think it would be allowing an unfair advantage if counsel were heard for the complainant, and imposing a hardship on the trustees if they were called upon to pay counsel out of the funds of the society, and might make the decision of the arbitrators to depend rather upon the relative merits of the counsel than upon the intrinsic merits of the case. I have already quoted the language of Parke, J., in Collier *v.* Hicks, where that learned judge lays down in wide terms, that, in the absence of ancient usage to the contrary, every tribunal has a discretion as to who shall be permitted to appear as advocates before it. And I see the same point substantially came under the consideration of this court in Tillam *v.* Copp, 5 C. B. 211 (E. C. L. R. vol. 57), where the court refused to set aside the award, on the ground that the arbitrator had declined to permit a stranger to be present for the purpose of assisting the defendant's attorney with practical hints for the conduct of the defence,—holding that an arbitrator has a general discretion as to the mode of conducting the inquiry before him. Maule, J., in that case observes,—"It is a very proper, and in some cases a very indispensable thing that arbitrators should, within proper limits, be allowed to deviate from the ordinary rules which govern courts of justice: for instance, an arbitrator may properly and conveniently take the examination of a sick or infirm person at his own house. It is, therefore, evidently quite fallacious to say that any suspicion of misconduct is to fix upon an arbitrator, because he has thought fit to depart from the ordinary course in conducting the proceeding before him." I am of opinion that the authorities as well as the reason of the thing are opposed to this application.

*797] WILLIAMS, J.—I am entirely of the same opinion. *In point of law, I think an arbitrator has a right to refuse to hear counsel, in his discretion. At the same time, there are undoubtedly many cases where an arbitrator, who is anxious to do his duty impartially, would be wrong in refusing a party the privilege of appearing by counsel. But, on this occasion, it is manifest that the arbitrator has exercised a sound discretion. Without, therefore, saying as a general rule

that an arbitrator may decline to hear counsel, it is enough to say that in the particular case the refusal was justified.

The rest of the court concurring, Rule refused.

TUPPER and Others *v.* FOULKES. *Jan.* 26.

A deed was executed by a son of the defendant, thus,—"John William Foulkes for Thomas Foulkes" (the defendant). In an action upon a covenant contained in the deed, the defendant pleaded non est factum. It was proved, that, the deed being shown to the defendant executed as above, he was asked whether his son had authority to execute it for him, and whether he adopted his son's act, to which the defendant answered in the affirmative:—Held, that this amounted to a re-delivery of the deed, and sustained the issue.

THIS was an action brought to recover from the defendant his proportion of certain expenses which had been incurred by the plaintiffs as trustees under a deed of arrangement entered into between one Richard Clements and his creditors, of whom the defendant was one.

The defendant pleaded, amongst other pleas, non est factum; and at the trial before Keating, J., at the last Summer Assizes at Bristol, the following facts appeared in evidence:—

On the 21st of February, 1859, a meeting of the creditors of Clements was held for the purpose of *obtaining their assent to a deed of arrangement. The defendant, who was a creditor, was not present; but his son who attended for him signed the deed thus,—"John William Foulkes for Thomas Foulkes." The deed contained, amongst other provisions, a clause whereby the creditors executing it covenanted to indemnify and save harmless the trustees against all expenses they might incur in the execution of the trust. [*798

The solicitor for the trustees (Mr. Pinniger) proved that the defendant was present at a meeting of the creditors on the 25th of May, 1859, when he (the witness), showing him the deed, asked him if his son had authority from him to execute it, and whether he adopted such execution; that the defendant thereupon said that his son had authority to execute the deed for him, and that he adopted his signature; that, at this meeting, a report was read stating what the trustees had done in the execution of the trust, and the defendant was party to a resolution confirming that report; that the defendant had attended several subsequent meetings of the creditors, at which the steps taken by the trustees were discussed; and that generally he took an active part in the business.

On the part of the defendant, it was objected that he was entitled to a verdict on non est factum, inasmuch as there was no evidence that the son was authorized *by deed* to execute the trust-deed. For the plaintiffs, it was insisted that the defendant's adoption of the deed when shown to him was enough, and that, at all events, his conduct upon that occasion amounted to a re-delivery.

The learned judge, upon the authority of Doe d. The Birmingham Canal Company *v.* Bold, 11 Q. B. 127 (E. C. L. R. vol. 63), ruled that he would assume from the acknowledgment or admission of the defendant that the son was authorized by deed, and that the defendant's conduct *amounted to a re-delivery: and he directed the [*799

jury accordingly, who thereupon returned a verdict for the plaintiffs for 195*l.*

Collier, Q. C., in Michaelmas Term last, moved for a rule nisi for a new trial, on the ground "that the admission by the defendant was evidence to prove the plea of non est factum." (*a*) He submitted that, there being no proof of any legal authority in the son to execute the deed in the name of his father, his execution of it was no evidence against the father, and that the subsequent verbal ratification amounted to nothing. To make this the deed of the defendant, there must be affirmative proof that the son had authority *by deed* to execute: and, if there was authority given by deed, the execution must be in the name of the party giving the authority: not, as here, "John William Foulkes for Thomas Foulkes." In Taylor on Evidence, § 907, 3d edit., Vol. II., p. 811, the rule is thus laid down,—"In order to authorize an agent to execute a deed for his principal, the authority must be given by an instrument under seal (Berkeley *v.* Hardy, 5 B. & C. 355 (E. C. L. R. vol. 11), 8 D. & R. 102 (E. C. L. R. vol. 16), White *v.* Cuyler, 6 T. R. 176, Steiglitz *v.* Egginton, Holt, N. P. C. 141 (E. C. L. R. vol. 3), Williams *v.* Walsby, 4 Esp. 220, Callaghan *v.* Pepper, 2 Irish Eq. R. 399); and, as such an instrument or power of attorney *transfers* no interest, the agent or attorney being merely put thereby in the place of the principal, it follows that the deed must be executed by the agent in the name and as the act of him who gave the power (Hunter *v.* Parker, 7 M. & W. 322, 343,† per Parke, B.). Neither can a parol ratification by the principal of a deed executed by his agent give validity
*800] *to the deed, when the agent has not been authorized to act by an instrument under seal (Hunter *v.* Parker); and it seems that evidence of the implied, if not of the express, recognition or adoption of the deed by the principal, will not, even as against him, raise a presumption that the agent was thus formally authorized to act, so as to dispense with the necessity of proving that fact:" Lord Gosford *v.* Robb, 8 Irish Law Rep. 217. Formerly, no admission of a party to a deed could dispense with the necessity of calling the attesting witness. The latest case on that subject is Whyman *v.* Garth, 8 Exch. 803,† where it was held, that the 14 & 15 Vict. c. 99, s. 2, which renders the parties to a suit competent and compellable to give evidence, has not altered the rule of law which requires a written instrument to be proved by the attesting witness; and where Pollock, C. B., in delivering the considered judgment of the court, says,—"We think that the rule of law requiring proof by the subscribing witness is so inflexible, clear, and universal, that it cannot be set aside by any reasoning, however cogent." And, though that is now changed,(*b*) still the rule as to execution remains unchanged. The language of Parke, B., in Hunter *v.* Parker, is express. "Neither a parol ratification," says that learned judge, "nor a parol authority, could have the effect of giving power to the auctioneer to execute a *deed* for the plaintiff, or to make the bill of sale *his deed:* such a power could be given by an instrument under seal only; and must be executed in the name and as the act and deed of him who gave

(*a*) Substantially, for misdirection or misreception of evidence.

(*b*) "It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto:" 17 & 18 Vict. c. 125, s. 26.

the power; for, a power of attorney *transfers* no interest; *the attorney is merely thereby put in place of the principal, and represents his person:" and his own act could convey nothing: Combe's Case, 9 Co. Rep. 75, 77. In Lord Gosford *v.* Robb, 8 Irish Law Rep. 217, in ejectment on the title, the land-agent of a landlord, under his directions, served a notice to quit, on which the ejectment was brought. The tenant at the trial produced a lease signed by the agent, and under which he had been registered as a freeholder, and a certificate of his registry thereunder, kept in the landlord's office: and it was held that the tenant was bound to prove that the agent had a power of attorney to execute leases from the landlord, and that such alleged adoption by the landlord of the lease did not dispense with the necessity of such proof, and that the judge was right in refusing to admit the lease in evidence. [WILLIAMS, J.—The delivery makes the deed. If we are to presume anything, we must presume that this deed was delivered as the act and deed of the defendant, the father. A good delivery is not vitiated by a bad signature.] It is true, you may by admissions get at the effect of the deed,—Slatterie *v.* Pooley, 6 M. & W. 664:† but that is a very different question from this. [ERLE, C. J.—Doe d. The Birmingham Canal Company *v.* Bold, 11 Q. B. 127 (E. C. L. R. vol. 63), is very like this case. There, on ejectment upon the demise of a corporation, it appeared from the defendant's admissions that he had taken the land by permission of H., a servant of the corporation, and that F., another servant of the corporation, had given him notice to deliver up possession. No lease nor notice nor appointment of F. or H. as agent under seal was produced: and it was held that the jury were rightly directed to find for the plaintiff if they thought that H. and F. were authorized by the company to act.] A rule nisi having been granted, [*801

**Montague Smith*, Q. C., and *Coleridge* showed cause.—The ruling of the learned judge was perfectly correct. The alleged informality of the signature was disposed of on the motion; and the rule was granted only on the ground of absence of proof of authority in the son to execute the deed on behalf of his father. Upon every principle of law, it is submitted that the subsequent admission of the defendant was sufficient proof that the deed was duly executed. The defendant by his language and by his acts treated the deed as his deed. It could not be his deed unless duly executed. Every man is presumed to know the law; and every presumption will be made against the defendant under such circumstances. The case of Lord Gosford *v.* Robb, 8 Irish Law Rep. 217, does not bear out the proposition which is sought to be founded upon it. Doe d. The Birmingham Canal Company *v.* Bold, 11 Q. B. 127 (E. C. L. R. vol. 63), goes further than this case. Lord Denman, in giving judgment, says: "In this case there was evidence, in the nature of admission from the conduct of the defendant, that the secretary of the canal company, who created the tenancy at will, and the successor who determined it in 1831, had authority from the company: but there was no direct evidence of authority under seal. The judge left it to the jury to say whether they inferred an authority, and did not tell them that an authority under seal was necessary. A motion has been made for a new trial for misdirection in this respect: but we are all of opinion that the rule should be refused. The jury were at liberty to infer any possible valid authority: and we cannot [*802

assume that a canal company may not be incorporated by private act of parliament, and may not be empowered thereby to appoint an agent without an instrument under seal: see Rex *v.* Bigg, 3 P. Wms. 419, 424." [KEATING, J.—Suppose the son had signed *the deed without the authority of his father, and the father had afterwards said, "I acknowledge this to be my deed, and deliver it as my deed," would not that do? The operative part of the ceremony is the delivery. WILLIAMS, J.—Signature is not essentially necessary to a deed. That was one of the grounds upon which we refused the rule on the other point. The essence is the delivery.]

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Collier, Q. C., in support of his rule.—The execution of the deed by the defendant is directly put in issue upon the record. The evidence was, that the defendant's son, in the father's absence, signed the deed, not in the name of his father, but thus,—"John William Foulkes for Thomas Foulkes." It was then sought to prove the execution of the deed by the defendant's admission that "he authorized his son to execute the deed, and that he adopted it." It is submitted, upon the authorities cited on the motion, that there was no evidence to sustain the issue. In Berkeley *v.* Hardy, 5 B. & C. 355 (E. C. L. R. vol. 11), 8 D. & R. 102 (E. C. L. R. vol. 16), where an indenture was made between "A., for and on behalf of B., on the one part, and C. on the other part," A. being thereunto authorized by writing under B.'s hand, *but not under seal*, and A. executed the deed in his own name,—it was held that B. could not maintain covenant on the deed, although the covenants were expressed to be made by C. to and with B. Abbott, C. J., said: "I am not aware of any instance in which the court, upon the production of an instrument insufficient to support an action founded upon it, has presumed the existence of another deed which would be sufficient." In Abbott *v.* Plumbe, 1 Dougl. 216, in an action on a bond, proof of the acknowledgment of the obligor was held not to supersede the necessity of calling the subscribing witness. Admissions of a party that he executed a *deed are clearly not evidence that he did execute it. [ERLE, C. J.—The reason why it was formerly held that the attesting witness must be called, was, that the parties had agreed that that should be the only mode of proving their execution of the instrument. KEATING, J.—Suppose the defendant, when the deed was shown to him by Pinniger, had merely said, "I adopt the deed, and now deliver it," would not that have been sufficient?] No. There must be actual delivery. If the defendant had been present, and saw his son deliver the deed, that might have done. [ERLE, C. J.—Does not an acknowledgment that the party is bound by the deed,—the deed being present,—amount to a delivery? WILLIAMS, J.—"As a deed may be delivered by words without deeds, so may it also be delivered by deeds without words:" Sheppard's Touchstone, 8th edit. 58.] In Call *v.* Dunning, 4 East 53, it was held that the answer of the obligor of a bond to a bill filed for a discovery, in which he admitted the bond to have been executed by him, was only secondary evidence, and could not be received as evidence per se of the execution, without showing that due diligence had been used to discover who the subscribing witness was, who was alleged to be unknown. Here, the execution of the deed by the defendant is the very matter in issue. In Whyman *v.* Garth, 8 Exch. 803,† Pollock, C. B., says: "Here, on the pleadings, the de-

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fendant has put the execution of the deed in issue, and he is called and compelled as a witness to prove the fact. How can that be put reasonably as a waiver of the agreement not to give the deed in evidence without calling the attesting witness?" [WILLES, J.—Do you contend that the defendant's admission is no evidence?] None upon the issue on non est factum. Pennefather, C. J., in Lord Gosford *v.* Robb, says: "It is a rule, if a deed under seal be executed by an agent, *the deed appointing him agent must be produced and proved, and it would be breaking through that rule if we acceded to the [*805 setting aside this verdict. It is said because Lord Gosford by some acknowledgment recognised the lease, the judge should have told the jury there was sufficient evidence of the existence of a power of attorney: no admission of a party can be received in evidence in substitution for what would be otherwise required as proof of the execution of a deed." [ERLE, C. J.—With all deference to the learned judges who decided that case, I must say I do not quite apprehend the force of it.] The same learned judge, in a subsequent case,—Lawless *v.* Queale, 8 Irish Law Rep. 382,—thus deals with Slatterie *v.* Pooley: "Slatterie *v.* Pooley is the next case, and appears to be the leading one in support of the doctrine that a parol admission by a party to a suit is always receivable as evidence against him, although it relates to the contents of a deed or other written evidence, and *even though its contents be directly in issue in the cause.* I cannot subscribe to what was said by Parke, B., in that case, though it is added that Lord Abinger (who did not hear the arguments) concurred. The doctrine there laid down is a most dangerous proposition: by it a man might be deprived of an estate of 10,000*l.* per annum, derived from his ancestors by regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear they heard defendant say he had conveyed away his interest therein by deed, had mortgaged, or otherwise encumbered it; and thus by this facility so given the most open door would be given to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty. It is said it is evidence against the person himself who made the admission, and that there is no danger of untruth in what a man *admits against himself. [*806 Supposing the admission to be proved, is there no danger of mistake or misconception of the contents of a written instrument? It may be long and difficult: one part or clause may explain or qualify another; an unprofessional or ignorant man may be led to believe it may be so and so, whereas the real and true meaning may be the very reverse, or something very different: but, produce the deed or writing; litera scripta manet; on which side is the security, and why depart from the rule, that, if you want to give evidence of the contents of a writing, the writing itself must be produced? Is there no danger of untruth or misrepresentation when used against the party making the admission? That is the ground put by Parke, B., and in which I cannot agree, when I know by experience how easy it is to fabricate admissions, and how impossible to come prepared to detect the falsehood. Why are writings prepared at all, but to prevent mistakes and misrepresentations? And, why, having taken that precaution, with such writing at hand, and capable of being produced, is the same to be laid aside, and inferior and less satisfactory evidence resorted to? If you are at liberty to give parol

evidence of the contents of a writing, you run the risk of introducing parol evidence to vary or contradict the written evidence. Is that the law? Certainly not." The language of Parke, B., in Hunter v. Parker, 7 M. & W. 343,† is express, that a power to execute a deed can only be given by deed, and that a parol authority or a parol ratification amounts to nothing. Even supposing the admission had been in these terms, "I executed a deed authorizing my son to execute the deed for me," it would not have dispensed with the necessity of producing the deed. [WILLIAMS, J.—I am strongly inclined to think that that which took place here amounted to a second delivery of the deed. *In
*807] Hudson v. Revett, 5 Bingh. 368 (E. C. L. R. vol. 15), 2 M. & P. 663, the defendant executed a deed conveying his property to trustees to sell for the benefit of creditors, the particulars of whose demands were stated in the deed: a blank was left for one of the principal debts, the exact amount of which being subsequently ascertained was inserted in the blank the next day in the defendant's presence and with his assent; and the defendant afterwards recognised the deed as valid, in various ways, particularly by being present when it was executed by his wife, and by joining her in a fine to enure to the uses of the deed. It was objected on the part of the defendant that the deed was void; and the following passage was cited from Bull. N. P. 267,—"If there be blanks left in an obligation in places material, and filled up afterwards by the assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered: as, if a bond were made to C., with a blank left after for his Christian name and for his addition, which is afterwards filled up." But Holroyd, J., in summing up told the jury that it did not appear in the passage cited that the alteration was made in the presence of the party; but that, if in such a case there was that which amounted to a redelivery, and showed that the party meant the deed should be acted on in its altered state, the alteration being made in his presence would amount to a redelivery, and the deed would be his in its altered state. He referred to Goodright d. Carter v. Straphan, Cowp. 201, where the redelivery by a feme, after the baron's death, of a deed delivered by her whilst covert, was held a sufficient confirmation of the deed to bind her without re-execution or re-attestation; and said that circumstances alone might be equivalent to a redelivery. Then, observing on the fact that the blank in the present
*808] case had, according to a previous arrangement, *been filled up in the defendant's presence, and with his consent, that he had afterwards assisted at and sanctioned the execution of the deed by his wife, and had acted upon it as a valid instrument,—he said, that, unless the jury disbelieved the evidence, there was abundant ground for their considering the deed as the deed of the defendant. The jury having found for the defendant, the ruling of the learned judge was upheld by the court. That case was cited and approved by the Court of Exchequer in Hibblewhite v. M'Morine, 6 M. & W. 200, 215.†] The ground of the decision there was, that the deed was not a perfect deed until the sum had been ascertained and inserted.

ERLE, C. J.—I am of opinion that this rule should be discharged. Looking at the authorities which have been adverted to,—Doe d. The Birmingham Canal Company v. Bold, 11 Q. B. 127 (E. C. L. R. vol. 63), and the other cases,—I am clearly of opinion that the admission of the

defendant is always evidence to prove everything that he intended to admit. Whether the construction to be put on the conversation which took place between the defendant and Mr. Pinniger be such as has been contended by Mr. *Smith* or by Mr. *Collier*, it is unnecessary for us to decide, because, the issue being whether the deed was the deed of the defendant or not, I am clearly of opinion that the evidence showed such facts as amounted to a delivery by him of the deed as his deed. It was shown to him as his deed, and he recognised and adopted it as a valid deed.

WILLIAMS, J.—I also am of opinion that the rule should be discharged. As to the first point, I agree that, if the evidence had been that the defendant had said, "I authorized my son by deed to execute the deed for me," that would have been good evidence *that the defendant intended to admit that he executed the deed by the hands of his son. But, whether or not the words he used were tantamount to that, it is quite unnecessary to give any opinion, because I agree with my Lord that there was evidence here of a second delivery. The deed having been executed by the son in his own name, thus,—"John William Foulkes for Thomas Foulkes,"—it was brought into a room in which the defendant was, and, the deed being shown to him, he was asked whether his son had authority to execute it for him and whether he adopted the signature, and the defendant answered that his son had authority and that he adopted the deed as his: and there was proof that he subsequently acted as if the deed was a valid deed. This clearly amounted to a second delivery. It has long been established that to constitute a delivery it is not necessary that the party should take the document in his hand and say, "I deliver this as my act and deed." Anything to show that he treated the deed as his deed is enough. Several cases are put in Sheppard's Touchstone, 8th edit. p. 58, mostly taken from Lord Coke; amongst others,—"If the deed be sealed and lying in a window or on a table, and I use these or the like words, 'There it is: take it as my deed,' this is a good delivery, and doth perfect the deed; for, as the deed may be delivered by words, without deeds, so may it also be delivered by deeds, without words." Here it is plain upon the evidence that the deed being in the room and already sealed, and his name being affixed to it, the defendant in effect says, "I recognise that as my deed." The case of Hudson *v.* Revett, 5 Bingh. 368 (E. C. L. R. vol. 15), 2 M. & P. 663, as recognised by Lord Wensleydale in Hibblewhite *v.* M'Morine, 6 M. & W. 200,† shows that there was abundant evidence to prove the affirmative of the issue. [*809

*WILLES, J.—I did not hear the whole of the argument.(*a*) But, so far as I ought under those circumstances to express an opinion, I concur with my Lord and my Brother Williams in thinking there was ample evidence of delivery. [*810

KEATING, J.—I retain the opinion I expressed at the trial, that there was evidence that the defendant executed the deed. First, there was an admission by the defendant that he had given authority to his son to execute the deed in his name. I had in my mind the case of Doe d. The Birmingham Canal Company *v.* Bold, 11 Q. B. 127 (E. C. L. R. vol. 63), from the judgment of the court in which case it is to be gathered that they thought a sufficient authority might be inferred from the de-

(*a*) His Lordship was engaged in the Divorce Court.

fendant's admissions. But, whether or not the words here used by the defendant justified the inference which the jury drew from them, I am clearly of opinion that there was evidence of a sufficient delivery of the deed by the defendant to bind him. The deed being present and seen by the defendant, he deliberately adopts the act of his son. But the evidence does not stop there. It was proved that the defendant afterwards took an active part in directing the proceedings under this very deed. It was clear from his statements and his acts that he intended to acknowledge the deed as his deed. That amounts to a delivery in law, and is evidence upon non est factum. There is a case to which I may refer as having some bearing upon this point, viz. the case of The King *v.* The Inhabitants of Longnor, 4 B. & Ad. 647 (E. C. L. R. vol. 24). There, it was necessary to prove the execution of an indenture of apprenticeship. The pauper and his father (neither of whom could *811] write) had directed an attorney to sign the deed *for them, and the pauper then took the deed to his master and delivered it to him, and served under it: and the Court of King's Bench held that this was a sufficient execution and delivery of the deed to make it the deed of the father, because it might be inferred that the attorney had been duly authorized to execute it in his name. The evidence of delivery in this case appears to me to be much stronger than the evidence was there. I entirely agree with the rest of the court in discharging this rule.

Rule discharged.

Collier asked leave to appeal; but the court declined to grant it.

Leave to appeal refused.

*THE MERSEY DOCKS AND HARBOUR BOARD *v.* CAMERON and Others. *Feb.* 25. [*812

The trustees of the Birkenhead Docks were empowered by various acts of parliament to take lands by purchase, &c., to construct works, to resell or lease land not wanted, to impose (within certain limits) such rates for vessels using their docks as they might think proper, and to vary those rates, and to lease their wharfs, quays, &c. They were also empowered to borrow money on the security of the rates. *All* sums received from rates or the sale or rents of land were to be laid out by them in defraying the costs of the works, paying officers and servants, carrying the acts into execution, and paying the interest and principal of moneys borrowed. The Court of Queen's Bench held, in the case of The Trustees of the Birkenhead Docks *v.* The Overseers of Birkenhead, 2 Ellis & B. 148, that the trustees were rateable to the poor in respect of their premises.

The Mersey Docks and Harbour Board, under a series of acts containing very similar provisions, were held by the Court of Common Pleas in The Mersey Docks and Harbour Board *v.* Jones, 6 C. B. N. S. 114,—in deference to a previous decision of the Court of Queen's Bench, upon a case stated by the sessions (The King *v.* The Inhabitants of Liverpool, 7 B. & C. 61, 9 D. & R. 780),—not to be rateable in respect of their premises.

By the Birkenhead Docks Act, 1855, 18 & 19 Vict. c. clxxi., all the works, &c., and all the estate, &c., of the Birkenhead Docks were transferred to and vested in the corporation of Liverpool, *subject to the liabilities created by act of parliament.* And by a subsequent act, 20 & 21 Vict. c. clxii., the Liverpool Docks estate, and all property held by or in trust for the trustees of the Liverpool Docks under the acts before mentioned, were vested in the Mersey Docks and Harbour Board, "but subject to all charges and liabilities affecting the same:"—

Held, by the majority of the court, that, whether or not the Mersey Docks Board were exempted from liability to be rated to the poor in respect of their occupation of the Birkenhead Docks, by reason of their occupation not being a beneficial one, the exemption furnished only a ground of appeal to the quarter sessions against the rate, and not ground for an action in respect of a levy made to enforce the rate,—Willes, J., intimating a doubt (though disclaiming any intention to give a final opinion upon the point) "whether the statutory avowry could be proved, where there was an absolute exemption from the rate."

THIS was an action of replevin brought by the plaintiffs against the defendants for the taking and detaining of certain goods and chattels of the plaintiffs.

The following case was stated pursuant to the Common Law Procedure Act, 1852:—

All the acts of parliament relating to the Liverpool and Birkenhead Docks and the Birkenhead Dock Company were to be referred to as part of the case. Those relating to the Liverpool Docks are twenty-two in number, and form a series extending from the 8th of Queen Anne to the 21st year of the reign of Her present Majesty, both inclusive. Those relating to the Birkenhead Docks and Birkenhead Dock Company respectively are thirteen in number, commencing with the 7 & 8 Vict. c. lxxix., and ending with the 18 & 19 Vict. c. clxxi.

By rates made for the relief of the poor of the township of Birkenhead and for various other purposes, the Mersey Docks and Harbour Board (hereinafter called the plaintiffs) were in May, 1858, assessed in *the sum of 167*l.* 10*s.* in respect of the annual value of the dock estates within the said township vested in them, according to the following schedule:— [*813

Description of property rated.	Name or situation of property.	Rate at 6*d.* in the pound.		
		£	*s.*	*d.*
Offices	Canning Street	1	3	0
Offices and store-room and land, workshops, mortar-mill, and steam-engine and machinery	Dock Quay	4	12	6
Enclosed and unenclosed land occupied by pipes, drying-kiln, and cranes	Poolside	7	10	0
13 warehouses, timber-shed, and land connected therewith, and one shed	Poolside	46	2	6
Egerton and Morpeth Docks, part of great float, graving dock, gridiron and cranes, and buildings on South Reserve	Poolside	108	2	0
		£167	10	0

The plaintiffs were in November, 1858, further assessed in the sum of 235*l.* 2*s.* in respect of the annual value of the dock estates within the said township vested in them, according to the following schedule:—

Description of property rated.	Name or situation of property.	Rate at 8*d.* in the pound.		
		£	*s.*	*d.*
Offices	Canning Street	1	10	8
Offices, store-room, steam-engine, mortar-mills, workshops, land	West of Egerton Dock	7	13	4
Steam-engine, mortar-mills, yard, lime-kiln, and land	On the South Reserve	6	3	4
Stable	Neptune Street		6	0
Enclosed land occupied by stone, &c., and unenclosed land and drying-kiln	Poolside	4	19	4
14 warehouses, wharf, cranes, one shed	Poolside	49	6	8
Timber-sheds, land, and steam-engine		21	0	0
Egerton and Morpeth Docks, graving-dock, gridiron, sheds, and cranes on Dock Quay, land on ditto called the South Reserve, within the township	Poolside	144	2	8
		£235	2	0

*814] *The township of Birkenhead, in the county of Chester, was placed under the management of public commissioners (since incorporated), under the title of "The Birkenhead Improvement Commissioners," by an act of parliament of 3 & 4 W. 4, c. lxviii.

In the year 1844, an act (7 & 8 Vict. c. lxxix.) was passed, intituled "An Act for constructing tidal basins, a dock, and other works at Birkenhead, in the county of Chester, and for other purposes:" and it was thereby enacted that the commissioners constituted under the act of the 3 & 4 W. 4, c. lxviii., should be commissioners for carrying that act into execution, and should be called "The Commissioners of the Birkenhead Docks," and should have authority to construct tidal basins, a dock, and other works, and to purchase lands for those purposes, and to borrow on the credit of the rates and tolls by that act granted, and of any property vested in the said commissioners by virtue of that act, a sum not exceeding 400,000*l.*; and as a security the commissioners might assign over the said rates, tolls, and property, or any part thereof,

to any person advancing or lending the same money, by way of mortgage, in the manner and form therein directed and provided, and subject and according to the provisions and true intent and meaning of the act in that behalf. The material clauses of the last-mentioned act with reference to the liability of the commissioners to be rated to the poor-rate in respect of the premises in their possession under the act, are set out in the case of The Birkenhead Dock Trustees *v.* The Birkenhead Overseers, 2 Ellis & B. 148, which case is hereinafter referred to.

By an act of the 8 & 9 Vict. c. iv., intituled "An act for the construction of a dock, wharf, walls, and other works by the Birkenhead Dock Commissioners, at Birkenhead, in the county of Chester, additional powers *were given to the said dock commissioners, enabling them to make a floating-dock and other works, and to borrow a further sum of money not exceeding 600,000*l.* on mortgage as aforesaid. [*815

By an act, 10 & 11 Vict. c. cclxiv., intituled "An act to authorize the Birkenhead Dock Commissioners to construct an additional dock and other works at Birkenhead, in the county of Chester, and for other purposes," and by the 10 & 11 Vict. c. cclxv., intituled "An act to alter and amend the acts relating to the Birkenhead Commissioners' Docks, and to make further provision with respect to the construction of sea or wharf walls along the Wallasey Pool, and for other purposes," additional powers were conferred upon the said commissioners.

By another act, the 11 & 12 Vict. c. cxliv., intituled "An act to alter and amend the several acts relating to the Birkenhead Commissioners' Docks, and to transfer the several powers of the said commissioners to a corporate body, to be intituled 'The Trustees of the Birkenhead Docks,' and for other purposes," the several rights, duties, powers, authorities, privileges, and immunities conferred upon the said dock commissioners by the former acts, for carrying into execution the several purposes and provisions of the said former acts and that act, were vested in certain persons thereby incorporated by the name of "The Trustees of the Birkenhead Docks."

By an act of 8 & 7 Vict. c. lx., a company called "The Birkenhead Dock Company" was incorporated, with a capital of 1,000,000*l.*, divided into shares, and with powers to make and maintain docks, warehouses, and other works at Birkenhead: and by the following acts, viz. 11 Vict. c. ix., intituled "An act to enable the Birkenhead Dock Company to sell or lease their land," and 16 & 17 Vict. c. clxxvii., intituled "An act to *amend the acts relating to the Birkenhead Docks Company, and to enable the company to make a railway for their works, and for other purposes, and of which the short title is 'The Birkenhead Dock Company's Act, 1853,' the powers of that company were in various ways amended and enlarged. [*816

By articles of agreement dated the 16th of May, 1855, and made between the trustees of the Birkenhead Docks, the Birkenhead Dock Company, and the corporation of Liverpool, it was agreed that all the property as therein described of the trustees of the Birkenhead Docks and of the Birkenhead Dock Company should, subject to any liabilities affecting the same, be purchased by and transferred to and vested in the corporation of Liverpool; and by the act of 18 & 19 Vict. c. clxxi., shortly called "The Birkenhead Docks Act, 1855," that agree-

ment was confirmed; and it was enacted by ss. 7, 8, 9, and 10, as follows:—

Section 7. "Subject to the provisions of this act, all the docks, lands, and buildings of or to which the trustees were immediately before the commencement of this act, by virtue of the trustees' acts or any of them or otherwise howsoever, seised, possessed, or entitled either at law or in equity, and the caisson belonging to those docks, are by this act transferred to and shall be vested absolutely in the corporation, but nevertheless upon the several trusts and conditions, and to and for the several uses and purposes upon, to and for which the trustees were heretofore seised or possessed or entitled to the same respectively, and *subject to the several liabilities created by act of parliament*, and also subject and without prejudice to the several leases and agreements for leases specified in the first schedule to the agreement for transfer, so far as such leases and agreements respectively are valid."

*817] *Section 8. "Subject to the provisions of this act, all the works, lands, and buildings, working plant, and materials, office furniture, and such like effects of the company, and all the estate, right, title, and interest of the company, or held upon trust for the company, in and to all the lands (hereinafter called the Herculaneum lands) which by the act of 11 & 12 Vict. c. xlii., the Herculaneum Dock Company were authorized to sell (being lands to which, as appears by that act, the company are entitled), are by this act transferred to and shall be vested absolutely in the corporation, *subject to liabilities created by the act of parliament*, save such as the Herculaneum lands can be relieved from under the said act of 11 & 12 Vict. c. xlii., and subject to the covenants referred to in the 2d section of that act, and to the several leases and agreements for leases specified in the second schedule to the agreement for transfer, so far as such leases and agreements respectively are valid."

Section 9. "Provided always that the transfer and vesting of the company respectively shall not take effect until the delivery by the corporation to the trustees and the company respectively of the bonds of the corporation to be as by this act provided delivered to them respectively."

Section 10. "Notwithstanding such transfer and vesting, and except only as is by this act otherwise provided, all purchases, sales, conveyances, leases, mortgages, bonds, contracts, agreements, securities, and other acts and things before the commencement of this act made, done, entered into, executed, or instituted under or by virtue of the recited acts or any of them, or with reference to the purposes thereof respectively, shall be as good, valid, and effectual to all intents and purposes whatsoever for, against, and with reference to the trustees and the com-

*818] pany *respectively, as if the said act were not passed, and may be proceeded in and enforced accordingly."

The said bonds were shortly afterwards delivered accordingly, and the said property became vested in the corporation of Liverpool.

By s. 16 of the same act it was further enacted as follows:—

"From and after the commencement of this act, the docks, lands, buildings, and caisson of the trustees, and the undertaking of the company by this act respectively transferred to and vested in the corporation, shall be one undertaking; and all the powers, privileges, and authorities

of the corporation under this act shall accordingly extend and apply to that one undertaking, and to the corporation and all other persons respectively with respect to the same."

By ss. 17, 18, 22, and 27 of the same act, it is further recited and enacted as follows:—

Section 17. "And whereas, by the Liverpool Dock Act, 1851, provision is made for the election, nomination, and appointment of twenty-four persons to be a committee called 'The committee for the affairs of the estate of the trustees of the Liverpool Docks,' which committee, when assembled, or any seven or more of them, shall have, use, and exercise exclusively all and every the powers and authorities in relation to the execution and carrying into effect the several purposes of that act and the several acts therein recited (which acts relate to the Liverpool Docks) given to or vested in the trustees of the Liverpool Docks, or the committee, by that act and the acts therein recited, or any of them, or which by any act thereafter to be passed may be given to or be vested in the trustees of the Liverpool Docks, or the committee: And whereas it is expedient that the undertaking of the corporation under this act so far as now completed *and adapted for the accommodation of [*819 shipping, and so from time to time as and when further portions thereof shall be so completed and adapted, should be managed by the said committee for the affairs of the estate of the trustees of the Liverpool Docks: Be it therefore enacted that so much and such parts of the undertaking by this act vested in the corporation as are now completed, or as may be hereafter completed, shall, as and when the same are adapted to the accommodation of shipping, be managed by the said committee, who shall have and exercise all such rights, powers, and authorities in relation thereto as if the same undertaking was vested in the trustees of the Liverpool Docks under or by virtue of any of the acts relating to those trustees, and formed a part of their estate."

Section 18. "The said committee shall keep separate accounts of their annual receipts arising out of the undertaking of the corporation under this act, and of their annual expenditure in relation thereto, which accounts shall be open to inspection at all reasonable times by the council of the borough of Liverpool, or any committee thereof, or by any person or persons appointed by them to inspect the same; and such accounts shall be annually audited in like manner as the accounts of the trustees of the Liverpool Docks; and the annual surplus (if any) of the receipts arising out of said the undertaking, over and above the expenditure connected therewith, shall be paid over by the committee to the corporation, and shall be by them applied, as far as the same will extend, in and towards the payment of the interest accruing on the bonds issued by the corporation for the purposes of their undertaking, and for carrying the same into effect, and in relief of the borough fund, so long as such bonds shall form a charge thereon."

*Section 22. "From and after the commencement of this act, [*820 and until parliament shall otherwise provide, all the powers and provisions of the recited acts respectively with respect to the management of the undertaking by this act vested in the corporation, and with respect to the levying of tolls and dues, and with respect to the appointment and payment of officers for the management and working of the undertaking, and with respect to the making of regulations for the use

and preservation of the works of the undertakings, and the protection of property in or upon the same, and with respect to the making of by-laws, and all the rights and authorities of the trustees and the company respectively incidental to and consequent on such powers and provisions respectively, shall apply to the undertaking of, and shall be exerciseable and may be had and enjoyed by the said committee of the Liverpool Docks, as if the same respectively had originally been conferred on and made applicable to the trustees of the Liverpool Docks and their undertaking respectively: Provided, nevertheless, that all liabilities imposed upon the trustees by the said recited acts respectively with reference to any of the matters aforesaid, shall apply to and be enforceable against the corporation."

Section 27. "If at any time hereafter the trustees of the Liverpool Docks shall be authorized by parliament to become the purchasers of the undertaking by this act vested in the corporation, then upon being repaid or adequately secured the repayment of all moneys expended by them in the purchase or completion of the said undertaking, or in relation thereto, or for the payment of which they shall have become liable, and being paid or relieved from all liability, expense, or loss incurred by them for the purposes of the said undertaking or incident thereto, with interest thereon, *or on such other terms as may be mutually agreed upon, and approved by parliament, the corporation shall, and they are hereby required to transfer the said undertaking as conferred upon the corporation by this act to the said trustees of the Liverpool Docks, together with all their powers, rights, privileges, and authorities in relation to the said undertaking, to the end that the same, and the future control and management thereof, may thereafter be vested in the said trustees of the Liverpool Docks, as part of the dock estate of Liverpool."

*821]

By the 20 & 21 Vict. c. clxii., intituled "An act for consolidating the docks at Liverpool and Birkenhead into one estate, and for vesting the control and management of them in one public trust, and for other purposes," and shortly called "The Mersey Docks and Harbour Act, 1857," the plaintiffs were incorporated. That act recites, among other things, "that it is expedient that the constitution of the Liverpool Dock trust should be altered, and that the docks of Liverpool and Birkenhead, and the powers in relation thereto of the trustees of the Liverpool Docks and of the corporation, and the north reserve near Birkenhead, and the observatory and landing-stage belonging to the said corporation, and the control over pilotage, harbour-lights, and other matters conducing to the safety or convenience of the shipping frequenting the port of Liverpool, should, subject to the provisions of the said Mersey Conservancy Act, and of this act, be vested in a new trust; and that the rights now lawfully exercised by the trustees of the Liverpool Docks and by the corporation, of levying rates and dues on shipping frequenting the port of Liverpool, or on goods carried in such shipping, should be transferred to the new trust, upon such terms and for such consideration as are *hereinafter mentioned, and that the proceeds of such rates and dues should be applied to the benefit of the port of Liverpool and of the shipping and trade of the said port."

*822]

By sections 26, 30, 49, 50, 51, 56, 59, and 61 of the same act it is enacted as follows:—

Section 26. "All such estate and interest in the docks, buildings, and other property, both real and personal, situate at Birkenhead or elsewhere, as are transferred or intended to be transferred to the corporation of Liverpool by The Birkenhead Docks Act, 1855, shall, upon and after the 1st day of January, 1858, vest in the board, but subject to all charges and liabilities affecting the same."

Section 30. "All powers, rights, and privileges vested in or exercisable by the corporation of Liverpool, the Liverpool Dock Trustees, the Liverpool Dock Committee, or any of such authorities, under or in pursuance of or for the purpose of any of the acts mentioned in the schedule hereto, and not inconsistent with this act, shall, from and after the 1st day of January, 1858, be vested in and exercisable by the board."

Section 49. "Subject to the provisions of this act, the board shall stand possessed of all the property, powers, rights, and privileges hereby transferred to them, upon the trusts and for the purposes upon and for which such property, powers, rights, and privileges were holden previously to the commencement of this act."

Section 50. "From and after the 1st day of January, 1858, all docks and works belonging to the board, and all docks and works that may hereafter belong to the board, shall be deemed to constitute one estate only, hereinafter called 'The Mersey Dock Estate;' and a uniform system of management shall be adopted with respect to the whole of such Mersey Dock Estate."

*Section 51. "The board shall immediately after the commencement of this act proceed with the construction of the outer works at Birkenhead, referred to in 'The Birkenhead Docks Act, 1853,' with a view to the completion of the same substantially in accordance with the plans that have been sanctioned by parliament." [*823

Section 56. "The following rules shall be observed by the board with respect to the moneys received by them under this act, that is to say,—

"1. The conservancy expenditure shall be defrayed out of the conservancy receipts:

"2. The pilotage expenditure shall be defrayed out of the pilotage receipts:

"3. No portion of the conservancy receipts or pilotage receipts shall be applied in aid of the general expenditure:

"4. No sums shall be payable in respect of docks by any vessel that does not use the same:

"5. Save as by this act is provided, no moneys receivable by the board shall be applied to any purpose unless the same conduces to the safety or convenience of ships frequenting the port of Liverpool, or facilitates the shipping or unshipping of goods, or is concerned in discharging a debt contracted for the above purposes."

Section 59. "The board shall render to parliament as soon as may be after the 24th day of June in every year an account of its receipts during the preceding year ending the 24th of June, and the manner in which the same have been applied."

Section 61. "From and after the 1st day of January, 1858, all such provisions contained in the acts specified in the first schedule hereto, or in any other act, as are inconsistent with this act, are hereby repealed."

The constitution and management of the Liverpool *Dock trust, and the application of its revenues, will appear from the [*824

case of The King *v.* The Inhabitants of Liverpool, 7 B. & C. 61, 9 D. & R. 780, from the 8th year of Queen Anne to the date of that case, being shortly prior to the passing of the next-mentioned act. That report, so far as the case stated for the opinion of the court is concerned, may be referred to as part of this case.

Under the acts of 6 G. 4, c. clxxxvii., and the 14 & 15 Vict. c. lxiv. (being two of the acts comprised in the said series), such constitution was altered by the appointment in manner directed by those acts of the said committee called "The committee for the affairs of the estate of the trustees of the Liverpool Docks;" and all the powers and authorities of the said trustees of the Liverpool Docks were vested in such committee: and such constitution, so altered as last mentioned, continued until all the powers both of the said committee and trustees were transferred to the plaintiffs by the act of the 20 & 21 Vict., as hereinbefore mentioned.

By sections in the Liverpool Dock acts passed after the 8th of Anne hereinbefore mentioned, all the acts in the said series, including the 8th of Anne, are directed to be read and construed as one act.

After the passing of the said act of the 20 & 21 Vict., the plaintiffs proceeded with the construction of the docks at Birkenhead; and they are still incomplete.

The plaintiffs manage the whole dock estates now vested in them as one estate, by their servants and agents, who receive and account for to them the dues and other moneys arising from the management of the said estates; and no part of the estate and premises comprised in the above schedules is let off to other persons, nor are any rents paid to the plaintiffs for any part thereof.

*825] *The present bond debt of the plaintiffs chargeable on the rates and duties levied under the acts, is, and at the respective times of the making the said assessments was, upwards of 7,000,000*l.* sterling.

The present dock-rates and dues were before and at the time of the making of the said assessments, and still are, applied to public purposes only, and according to the directions of the said act of 20 & 21 Vict. c. clxii. (The Mersey Docks and Harbour Act, 1857), and the other acts of earlier date herein and therein referred to; and no member of the board derives any private advantage or emolument whatsoever from the execution of the trusts of the dock estates.

All the docks, sheds, tramways, railroads, offices, tenements, and other things mentioned in the above schedules were made, erected, and provided respectively under and in pursuance of the said several acts of parliament, or some of them (except the said act of 1857), and they consist partly of premises which before the passing of the 18 & 19 Vict. c. clxxi. were the property of and in the possession of the said Birkenhead Dock trustees, and partly of premises which before the passing of the same act were the property of and in the possession of the said Birkenhead Dock Company; and the whole of the said premises were used at the times of the said assessments solely for the purposes of the dock business, and are not used for any other purpose whatever; and the plaintiffs individually derive no personal benefit from the use or occupation of any part thereof; and all revenue of every kind derived by them from any part of the property is carried to the credit of the

general dock estate, and is appropriated and applied as all the other dock-dues and proceeds derived from the rest of its property, are in accordance with the provisions of the various acts of parliament.

*On the 28th of April, 1851, the trustees of the Birkenhead Docks were assessed to a rate made for the relief of the poor of the township of Birkenhead, in respect of the annual value of their estates within the township of Birkenhead, as follows:— [*826

	Estimated value.	Rateable value.	Rate at 6d. in the pound.
Lionel Goldsmid, William Bayley, Jun., and others, trustees of the Birkenhead Docks.			£ s. d.
Offices, workshops, and premises . . .	£550	£550	12 10 0

The trustees gave notice of appeal against the rate, upon the ground that their said estates were not rateable to the relief of the poor. A special case was stated by consent and by order of a judge under the 12 & 13 Vict. c. 45, for the opinion of the Court of Queen's Bench. The case was argued before the Court of Queen's Bench on the 3d of June, 1852, when the court gave judgment that the said estates of the Birkenhead Dock trustees were rateable to the poor-rate. The case is correctly reported in 2 Ellis & B. 148. Judgment in accordance with the decision of the Court of Queen's Bench was afterwards, on the 18th of October, 1852, entered by the court of quarter sessions.

The questions for the opinion of the court are,—Whether the said judgments of the said courts of quarter sessions, or either of them, are conclusive; and, if not, whether the plaintiffs are rateable to the relief of the poor in respect of the property enumerated in the above first schedule, or any part of it; and, if they are not, whether the present action can be maintained.

If the court should be of opinion that the plaintiffs *are rateable, or that the action cannot be maintained, then judgment is to be entered for the defendants for such sum as the court think they were entitled to distrain for, and costs. If the court should be of a contrary opinion, then judgment is to be entered for the plaintiffs for 3*l.* 3*s.* damages, and for their costs of suit. [*827

Sir Fitzroy Kelly, Q. C. (with whom was *Quain*), for the plaintiffs.(*a*)—It is not proposed to question the decision of the Court of Queen's Bench in the case of The Birkenhead Dock Trustees *v.* The Overseers of Birkenhead, 2 Ellis & B. 148 (E. C. L. R. vol. 75). By the Birkenhead Docks Act, 1855 (18 & 19 Vict. c. clxxi.), all the estate and interest of the Birkenhead Docks trustees were vested in the corporation of Liverpool, subject to the liabilities created by act of parliament: and by the Mersey Docks and Harbour Act, 1857 (20 & 21 Vict. c. clxii.),

(*a*) The point marked for argument on the part of the plaintiffs was as follows:—

"The plaintiffs will contend that the Birkenhead Docks having become part of the Liverpool Dock estate by virtue of the Mersey Docks and Harbour Act, 1857, are not rateable to the poor, on the grounds stated in The King *v.* The Inhabitants of Liverpool, 7 B. & C. 61 (E. C. L. R. vol. 14), 9 D. & R. 780 (E. C. L. R. vol. 22), and the Mersey Docks and Harbour Board *v.* Jones, 8 C. B. N. S. 114 (E. C. L. R. vol. 98)."

the Birkenhead Docks, as well as the Liverpool Docks, were vested in a new body called The Mersey Docks and Harbour Board. The 26th section of the last-mentioned act enacts that "all such estate and interest in the docks, buildings, and other property, both real and personal, situate at Birkenhead or elsewhere, as are transferred or intended to be transferred to the corporation of Liverpool by the Birkenhead Docks Act, 1855, shall, upon and after the 1st day of January, 1858, vest in the board, *subject to all charges and liabilities affecting the same.*" The *828] 27th *section contains similar words regarding the Liverpool Docks. If the latter docks are not liable to be assessed to the poor-rate, neither can the former be. By s. 50 the whole of the docks are amalgamated and placed under one uniform system of management. By s. 54 power is given to the board to vary the amount of rates or dues; and by the 5th article of s. 55, which directs the application of the moneys received by them, it is declared, that, "save as by this act is provided, no moneys receivable by the board shall be applied to any purpose, unless the same conduces to the safety or convenience of ships frequenting the port of Liverpool, or facilitates the shipping or unshipping of goods, or is concerned in discharging a debt contracted for the above purposes." It is submitted that the words of the 26th section, "subject to all charges and liabilities affecting the same," in their natural and strict legal and technical meaning apply to the charges in the nature of debts and securities on the property of the trustees which are referred to in the case. A poor-rate is not a charge upon the land, but a charge upon an individual in respect of his occupation of the land. In Theed *v.* Starkey, 8 Mod. 314, it was held that a covenant to pay taxes on the land, does not extend to the rates to church and poor, these being personal charges. The like was held in Case *v.* Stephens, Fitzgib. 297, where Eyre, C. J., says: "The poor and church rates are taxes payable in respect of the land, but they are not payable out of the land, for, the personal estate only is subject to them, whereas the land-tax does immediately charge and affect the land, and therefore is properly called an imposition upon the land." The Stonehouse Bridge Case, cited in Gould *v.* Capper, 5 East 356 n., is exactly in point. That was a case sent up from the court of quarter sessions in Devonshire, upon a *829] question concerning the validity of *a poor-rate. The statute 7 G. 3, c. 73, for building Stonehouse Bridge, by s. 19 exempted it from "the land-tax or any other public or parochial rate or tax whatsoever;" and by s. 20 provided that certain persons and their heirs should stand seised of the tolls of the bridge "to the same uses, trusts, and estates, and subject to the same wills, settlements, limitations, remainders, *charges*, tenures, rents, and encumbrances," as the ferry was, in lieu of which the bridge was erected: and it was held that the word *charges* only extended to *private* charges on the estate. To render a party liable to be assessed as occupier, he must be in the enjoyment of the immediate profits of the land: The Earl of Bute *v.* Grindall, 2 H. Bl. 265; Rowls *v.* Gells, 2 Cowp. 451. The crown is not liable to be assessed to poor-rate; but Crown land may in many cases be chargeable in the hands of tenants or servants, which would not be the case if it were a charge *on the land.* Poor-rate clearly never could have been contemplated as falling within the words "charges and liabilities affecting the land," in this statute. It would be inconsistent with the whole

scope and object of the act. The next question proposed for discussion is, whether the liability of the board to be rated can be tried in an action of replevin. It is submitted that the board are not occupiers within the statute 43 Eliz. c. 2, and these docks are not the subject of a rate within that statute. [ERLE, C. J.—Is not that questioning the decision of the Court of Queen's Bench in The Birkenhead Docks Trustees *v.* The Overseers of Birkenhead, 2 Ellis & B. 148 (E. C. L. R. vol. 75)? WILLES, J.—The principle of the decisions is, that, where there is no liability at all, no possibility of making a good rate, replevin is the proper remedy. Here, there is an exemption.] That is the real distinction. [WILLIAMS, J.—The question is, whether the rate unappealed against is a conclusive *answer to the action.] Yes. The purposes to which the Birkenhead trustees were bound to apply the [*830 moneys received by them are at an end. It is, therefore, immaterial to inquire whether the property was liable to be rated before it came to the possession of the Mersey Docks trustees. The principle which will be found to pervade all the cases, is, that, if the party rated is not an occupier, or the property is not rateable, the remedy is by replevin or by action of trespass; but that, if the party rated is an occupier, and the property in respect of which he is rated is property in respect of which the liability would exist but for some special exemption, there the remedy is by appeal to the quarter sessions. The question therefore is, whether the board were occupiers or the property rateable within the words of the statute. By the 1st section of the statute of Elizabeth, the churchwardens are required to raise a fund for the relief of the poor "by taxation of every inhabitant, parson, vicar, and other, and of every *occupier* of lands, houses, tithes impropriate," &c., in the parish: and s. 19 gives the power to replevy. These plaintiffs are not occupiers within the statute. They are a public board, appointed for public purposes, having no power to apply any part of the funds raised by them otherwise than to public purposes. In Rowls *v.* Gells, Cowp. 451, the validity of the rate was tried in an action of trespass. So, in Harrison *v.* Bulcock, 1 H. Bl. 68, where the objection was expressly taken. In Lord Bute *v.* Grindall, 1 T. R. 338, 2 H. Bl. 265, the point was raised on issues, and not on appeal. So, in Lord Amherst *v.* Lord Sommers, 2 T. R. 372, where it was held that the possessions of the Crown or of the public are not rateable, the question was raised in an action of trespass. It is impossible to distinguish that case from the present. The question was whether stables rented *by the [*831 colonel of a regiment, by order of the Crown, for the use of the regiment (the colonel not using them for his own horses, nor occupying them at all), were liable to be rated to the relief of the poor. Buller, J., said: "The question is whether the plaintiff be or be not the occupier of these premises. There is no case which is exactly applicable to the present. It has been contended that the plaintiff is the occupier, because he is the lessee of the stables. But it appears on this case that he did not contract as a general lessee: and it is material to consider the effect of the sign manual. It appears to us that the plaintiff acted merely for the benefit of the public, by order of the Crown: he contracted by leave of the Crown, *and is like a trustee for the public, deriving no benefit whatever to himself from the contract.* For, if he had acted for his own benefit, there would have been no occasion

for the sign-manual. Besides, it appears, that, in point of fact, so far from the colonel's making use of these stables, his horses have never stood there. So that in no point of view whatever can the plaintiff be considered as the occupier." In Mitchell *v.* Fordham, 6 B. & C. 274 (E. C. L. R. vol. 13), 9 D. & R. 335 (E. C. L. R. vol. 22), by an enclosure act it was provided that a certain corn-rent "free from all taxes and deductions whatsoever, except land tax," should be issuing out of the lands to be enclosed and other lands in the parish, and be paid to the rector in lieu of all great and small tithes, &c.: and it was held that this corn-rent was not liable to be assessed to the relief of the poor. There the question was raised by replevin. In Sabourin *v.* Marshall, 3 B. & Ad. 440 (E. C. L. R. vol. 22), the action against the sheriff for not granting a replevin was held maintainable, though it did not appear on what ground the plaintiff was not rateable. In Fletcher *v.* Wilkins, 6 East 283, replevin was brought. In The King *v.* Morgan, 2 Ad. & E. 618, n. (E. C. L. R. vol. 29), 3 N. & M. 68 (E. C. L. R. vol. 28),
*832] *a landlord permitted his tenant for years under a lease expiring in April, 1835, to give up the lands and farm-house in October, 1833, paying rent only until the day of quitting, and making a further payment and giving up the compensations he would have been entitled to as an outgoing tenant, in order to indemnify the landlord for loss to which he was subjected by the determination of the lease. The landlord did not take a new tenant, or occupy the premises, except by putting a man into the farm-house to take care of it. The value of grass and clover on the lands from October to April was 60*l.* After the tenant's departure, the landlord was rated to the poor as an occupier of the premises. He refused to pay the rate, but did not appeal: and, on his being summoned before two justices, they, after hearing the case, declined granting a distress-warrant. On motion for a mandamus to them to grant such warrant, the Court of Queen's Bench declined to interfere, the justices having heard and exercised their judgment upon the application, and it being doubtful whether the landlord was properly rated as a beneficial occupier. In George *v.* Chambers, 11 M. & W. 149,† replevin was held the proper remedy: and on the point being raised in Jones *v.* Johnson, 5 Exch. 862, 875,† Parke, B., said: "Surely replevin lies in all cases against a party by whose order goods have been improperly taken. We considered that matter well in the case of George *v.* Chambers. I do not think that such an objection is likely to prevail." In The Overseers of Bristol *v.* Wait, 3 N. & M. 359 (E. C. L. R. vol. 28), 1 Ad. & E. 264 (E. C. L. R. vol. 28), it was held, that, where a party is rated to the poor in respect of property not in his occupation, he is not bound to appeal, but may replevy any distress taken for such poor-rate. The case of Newbould *v.* Coltman, 6 Exch. 189,†
*833] goes the full length of the proposition for which the plaintiffs *contend. The poor law commissioners, in 1837, by an order, directed nine parishes, townships, and places to be formed into a union, to be called The Pateley Bridge Union, for the administration of the law for the relief of the poor. In the margin of the order were enumerated eleven townships,—first, Bewerley, secondly, Dacre, &c.; and the commissioners ordered that a board should be constituted according to the provisions of the Poor Law Amendment Act (4 & 5 W. 4, c. 76), fourteen to be the number of guardians, three for Bewerley, two for Dacre,

&c., treating them as separate townships. They then directed them to contribute to a common fund, for the purpose of providing a workhouse, &c., and afterwards fixed the proportions payable by each township or place. In 1848, the chairman and guardians of the union made an order on the plaintiff and three others, as overseers of the parish of Dacre-cum-Bewerley (treating the two as one township) for payment of 500*l.* by way of contribution towards the relief of the poor, &c. This order having been disobeyed, the defendants, who were magistrates, issued their summons to the plaintiff and the other overseers, as overseers of Dacre-cum-Bewerley, and afterwards issued a warrant of distress, under which the plaintiff's goods were taken. The plaintiff brought *trespass* for the seizure of his goods under this warrant: and it was held, that the statute 2 & 3 Vict. c. 84, s. 1, gave to the magistrates a power similar to that exercised by them in enforcing a legal poor-rate; but that, in the absence of a legal obligation to pay the contribution by the party whose goods had been seized, the magistrates had acted without jurisdiction, and were liable; and that trespass was the proper form of remedy. In Morrell *v.* Martin, 3 M. & G. 581 (E. C. L. R. vol. 42), 4 Scott N. R. 300, which is an authority to the same effect, Tindal, C. J., in delivering the judgment of the court, says: "There is a great difficulty, at first sight, *in reconciling the cases which have been brought in review before the court. It is clear, from all the cases, [*834 that neither the justices who issued the warrant in question, nor the surveyors who set the justices in motion, could have justified the act done under the warrant, without alleging that the party rated *was an occupier and had been duly assessed;* for, no distinction can in this respect exist between the highway-rate and the poor-rate: and the cases are express, that, if a person be assessed to the relief of the poor who is not by law liable, and his goods are taken by warrant of distress, an action of trespass will lie against the overseers levying under the distress: Nicholas *v.* Walker, Cro. Car. 394; Milward *v.* Caffin, 2 W. Bl. 1330; or against the magistrates who issued the warrant: Lord Amherst *v.* Lord Sommers, 2 T. R. 372; Weaver *v.* Price, 3 B. & Ad. 409 (E. C. L. R. vol. 23). And the ground of these decisions appears from what is said in Nichols *v.* Walker, viz., 'that the magistrates have but a particular jurisdiction, to make warrants to levy rates well assessed.'" Reliance will no doubt be placed, on the part of the defendants, upon two recent cases in the Court of Queen's Bench, viz., The Churchwardens, &c., of Birmingham *v.* Shaw, 10 Q. B. 868 (E. C. L. R. vol. 59), and The Queen *v.* Bradshaw, 29 Law J., M. C. 176. But, notwithstanding some doubt is raised by the inaccurate language of Lord Denman in the former case, it must be borne in mind that in both those cases the occupation and the property were within the statute of Elizabeth; whereas here the corporation exists only under the special acts of parliament, and was called into existence for certain defined public purposes.

Mellish (with whom was *C. Hutton*), contrà.(*a*)—The *cases last cited show clearly, that, if the party is in possession of pro- [*835

(*a*) The points marked for argument on the part of the defendants were as follows:—

"The defendants will contend, that, before the 18 & 19 Vict. c. clxxi., the property of the Birkenhead Docks trustees was liable to be rated to the poor-rate, as was decided in the case of The Birkenhead Docks Trustees *v.* The Overseers of Birkenhead, 2 Ellis & B. 148 (E. C. L. R. vol. 75), and the property of the Birkenhead Dock Company was liable to be rated as the

perty coming within the description of rateable property under the statute of Elizabeth, and claiming exemption by reason of the quality of the occupation, can only raise that question by appeal to the quarter sessions. One who has no beneficial occupation is not liable to be rated. But it is impossible to draw any distinction between beneficial occupation in fact, and beneficial occupation by reason of some statute. In the case of Lord Amherst *v.* Lord Sommers, 2 T. R. 372, there was no occupation at all by the colonel; the occupation was by the Crown. In Marshall *v.* Pitman, 9 Bingh. 595 (E. C. L. R. vol. 23), 2 M. & Scott 745, it was held, that, where a party having no stock in trade is rated as an *inhabitant* of a parish, his remedy is by appeal to the quarter sessions: replevin does not lie for a distress under such a rate. Tindal, C. J., there says: "The first question upon this case is, whether the plaintiff can maintain this action, not having *appealed to the court of quarter sessions against the rate; and that involves the question whether the magistrates had jurisdiction to make the rate, because if they had, the rate was a subject of appeal." He then refers to the language of the statute, and proceeds,—"To rate in such a sum as they shall 'think fit' does not import that they have a power to rate arbitrarily, but to rate the occupier according to the value of his occupation, the inhabitant according to his visible personal property; and, in order to determine whether the magistrates had jurisdiction, we have only to see whether the defendant was inhabitant or occupier. In Milward *v.* Caffin, 2 W. Bl. 1330, it was a dry question of fact whether the defendant was an occupier; for, it was admitted that if he were, the quarter sessions had jurisdiction in the matter. So, here, we must see whether the defendant is an inhabitant; for, if he be, the rate is a question of amount for the sessions. It is admitted, that, if he had the smallest amount of property to be rated, his proper course would be by appeal to the quarter sessions; but it is contended, that, where he has nothing rateable, he is entitled to proceed by action. But the sounder distinction seems to be, that, as an inhabitant possessing visible personal property, he is liable to be placed on the rate, although his rateable property turn out afterwards to amount to nothing." In The Churchwardens of Birmingham *v.* Shaw, 10 Q. B. 868 (E. C. L. R. vol. 59), it was held that a person exempt from poor-rate, as the occupier of premises belonging to a scientific or literary society, must, if assessed for such premises, contest the liability by appeal, and cannot bring an action for a levy made to enforce such rate not appealed against. Lord Denman, in giving judgment, said: "The question is narrowed to this, whether, there being a remedy by *837] appeal, and that remedy passed by, the law will allow *an action to be brought for the enforcement of a rate, good on its face, and made by a competent authority, on a person, and in respect of the occupation of property, apparently within the jurisdiction of that

property of an ordinary joint stock company; and that, according to the true construction of the 18 & 19 Vict. c. clxxi., and the 20 & 21 Vict. c. clxii., set out in the case, the property of the Birkenhead Docks trustees and of the Birkenhead Dock Company was transferred, first, to the corporation of Liverpool, and, secondly, to the Mersey Docks and Harbour Board, subject to the existing liability of such property to be rated to the poor-rate:

"The defendants will also contend that the question of the liability of the plaintiffs to be rated in respect of property in the township admitted to be in their possession could only be raised by appeal to the court of quarter sessions, and cannot be raised by an action of replevin."

authority. This is not a new question; nor is the principle of decision unsettled or difficult. The only difficulty lies in its application. The right of appeal is co-extensive with the operation of the rate. Whether it has defects which make it even a nullity in law, or be objectionable only as excessive in amount, or unequal in its assessment, any one who is grieved by it may appeal; but the right of action is limited, as well for the sake of convenience as on principles of law and justice. The making and allowance of the rate are acts intrusted by the law to certain functionaries, the overseers and the justices; and the exercise of their functions is subjected by the law to revision by a court of appeal. If, in the exercise of their functions, but acting within their jurisdiction, they do an erroneous act, it is no more null and void, while unquestioned by appeal, than an erroneous decision of this court on a matter within its jurisdiction while unquestioned by a writ of error. If it be appealed against, the law has made the decision of the court of appeal final; and, if that court confirmed the act of the inferior functionaries, however confessedly erroneous that decision might be, it would be conclusive for all purposes, and, among others, for enforcement: else this absurdity would follow, that a rate which the court of direct and final jurisdiction had pronounced valid, must be considered as invalid when considered collaterally in any other court as the protecting authority for the officer of the law who was directed to enforce it." There, the party was not liable to be rated at all; but, nevertheless, inasmuch as he was in the occupation of property primâ facie rateable, it was held that the question of *liability could only be contested [*838 by an appeal to the sessions. In a subsequent part of the judgment (p. 881), the court go on to say,—"If there be no beneficial occupier, the land for the purposes of the rate might equally be said not to be within the parish, because it ought not to be included in the rate: yet, so far as we know, this question has always been raised on appeal; and the distinction has been between the question whether occupier or not absolutely, which has been tried by action, and, whether beneficial occupier or not, which has been tried by appeal. And this seems the reasonable test. As soon as the land is shown to be in the parish, and A. B. to be the occupier, the case is primâ facie brought within the statute of Elizabeth, the rate on its face is good, and jurisdiction attaches. Whether that primâ facie case can be answered by any circumstances affecting the character of the occupation, is matter to be determined by the court of appeal, on appeal made." The general opinion must have been that replevin will not lie in such a case as this, otherwise the question would doubtless long before this have been raised in a court of error. The case of Fawcett *v.* Foulis, 7 B. & C. 394 (E. C. L. R. vol. 14), 1 M. & R. 102 (E. C. L. R. vol. 17), is referred to as an illustration of that distinction. [KEATING, J.—It is difficult to distinguish that case in some of its remarks from Lord Amherst *v.* Lord Sommers.] The Churchwardens of Birmingham *v.* Shaw was cited with approval in The Metropolitan Board of Works *v.* The Vauxhall Bridge Company, 7 Ellis & B. 964 (E. C. L. R. vol. 90). In the Queen *v.* Bradshaw, 29 Law J., M. C. 176, Cockburn, C. J., in the course of the argument, says: "Milward *v.* Caffin is recognised and distinguished in Marshall *v.* Pitman; the distinction being, that, where a person is an inhabitant with visible personal property in a parish, he

is primâ facie rateable, and, there being jurisdiction to rate him, he can only appeal to the quarter sessions; but, if he is not an occupier at *839] *all, as in Milward *v.* Caffin, as against him the rate is void." And in giving judgment his Lordship says: "The Churchwardens of Birmingham *v.* Shaw adopts and confirms the case of Marshall *v.* Pitman, which establishes the principle, that, where there is visible occupation of property within the rating parish, and the party rated objects, that, although he is in the visible occupation of the premises, his occupation is altogether devoid of benefit to himself,—that is matter for which he must seek his remedy by appeal to the quarter sessions." And Crompton, J., expresses his full concurrence in the principle enunciated by Lord Denman in The Churchwardens of Birmingham *v.* Shaw, as derived from Marshall *v.* Pitman. These authorities clearly establish that whether the occupation be beneficial or not can only be determined by appeal, and that there is no distinction in this respect between a want of beneficial occupation in matter of fact and a want of beneficial occupation by reason of a matter of law: the quarter sessions on appeal have jurisdiction over the law as well as the fact. In The Earl of Radnor *v.* Reeve, 2 Bos. & P. 391, confirmed by Allen *v.* Sharp, 2 Exch. 352,† it is said to have been determined by all the judges of England, that, "when a statute provides that the judgment of commissioners appointed thereby shall be final, their decision is conclusive, and cannot be questioned in any collateral way." [ERLE, C. J.—Harrison *v.* Bulcock, 1 H. Bl. 68, is a troublesome case for you. There, trespass was held to lie against the commissioners and collector of land tax for seizing the plaintiff's goods for land tax in respect of premises not assessable, viz. a house within the limits of an hospital, appropriated to an officer of the hospital for the time being. And Lord Loughborough says: "This being a building within the limits of the hospital, not let, nor *840] yielding any *profit, but in the occupation of a necessary officer, comes under the exemption of the act. The objection to the jurisdiction of the court is of no weight, the appeal to the commissioners being alone final when the question arises as to the quantum of the tax, and whether lands belonging to hospitals, &c., were assessed as such in the 4th year of William & Mary, or have been purchased since that time."] There, the party was exempted by the same act by which the tax was imposed.

Sir Fitzroy Kelly, in reply.—Everything turns here on the meaning of "occupier" or "occupation." The word is a flexible one, and its construction must depend, where the question arises on a statute, upon the meaning and intention of the legislature. In the case of Lord Amherst *v.* Lord Sommers, there could be no doubt that Lord Amherst had a sufficient occupation of the stable to enable him to maintain trespass against a wrongdoer; and yet the court held that he was entitled to question in an action of trespass whether he was an "occupier" within the meaning of the statute of Elizabeth. Here, the trustees have no occupation of these docks otherwise than as representatives of the public. Theirs is a mere legal occupation, or an occupation in contemplation of law. To constitute an occupation for the purpose of the statute of Elizabeth, it must be such a one as involves the actual beneficial perception of money or money's worth: The Earl of Bute *v.* Grindall, 2 H. Bl. 265. *Cur. adv. vult.*

WILLIAMS, J., now delivered the judgment of Erle, C. J., Keating, J., and himself:—

In this case we think our judgment ought to be for the defendants. When the case of The Mersey Docks Trustees *v.* *Jones, 8 C. B., N. S. 114 (E. C. L. R. vol. 98), was before us, we thought [*841 ourselves bound by the authority of the decision of The King *v.* The Inhabitants of Liverpool, 7 B. & C. 61 (E. C. L. R. vol. 14), 9 D. & R. 780 (E. C. L. R. vol. 22). The present case involves the same point: and, if no other question had been raised, we should have deferred giving our judgment until the Court of Exchequer Chamber, into which, we are informed, the case of The Mersey Docks Trustees *v.* Jones has been removed by writ of error, should have affirmed or reversed our decision.(*a*) But a second point has been raised on the part of the defendants, viz. that, even if the plaintiffs are not liable to be rated, by reason of their occupation not being beneficial, the exemption furnishes only a ground of appeal to the quarter sessions against the rate, and not for an action in respect of a levy made to enforce the rate.

In support of this contention, the cases of The Churchwardens of Birmingham *v.* Shaw, 10 Q. B. 868 (E. C. L. R. vol. 59), and The Queen *v.* Bradshaw, 29 Law J., M. C. 176, were cited. It cannot be denied that these deliberate decisions of the Court of Queen's Bench are directly in point in favour of the defendants. And we think it is our duty to defer to them, and to leave all further argument respecting them for the consideration of the court of error.

Possibly the two points may resolve themselves into one, viz. whether there can ever be an exemption from liability to rate, where there is an actual occupation by the person rated,—in other words, whether the true ground on which an occupation for public purposes has been held exempt, be not, that, in such cases, the occupation was that of the public, and there was no occupation at all by the person rated; and whether, therefore, the principle is not inapplicable whenever there is an actual occupier, notwithstanding *he derives no individual benefit from his occupation. If this be so, the actual occupation may well be [*842 regarded as bringing the case within the statute of Elizabeth, so as to render an appeal to the sessions the only proper mode of disputing the propriety of the rate. But, if the exemption be regarded as based on the doctrine that the word "occupier" in the statute of Elizabeth (which gives power to raise money by taxation of "every *occupier* of land," &c.) ought to be construed to mean "*beneficial* occupier," then it is certainly very difficult to understand the principle on which The Churchwardens of Birmingham *v.* Shaw and The Queen *v.* Bradshaw proceeded; because, if this be so, the statute may be read as if the words of it were "every *beneficial* occupier of lands," &c.; and how then can a valid rate be made on an occupier who is not a beneficial one? Surely there can be no distinction, on such a construction of the statute, between a man not an *actual* occupier of any rateable property (who clearly is not put to an appeal) and a man not a *beneficial* occupier of any; seeing that, if the statute be so read, one is just as much out of the reach of it as the other.

WILLES, J.—I agree that the judgment ought to be for the defendants upon the ground, that, upon the true construction of the transfer-

(*a*) The decision has since been affirmed.

ring statute (18 & 19 Vict. c. clxxi.), the plaintiffs took the property rated in the same condition as to liability to the rate in which it was when in the lands of the original proprietors.

I cannot truly say that I think replevin would not have been maintainable had there been no liability to be rated. I do not see how it can be maintained that the statutory avowry can be proved, where there
*843] is an absolute exemption from the rate. For obvious *reasons, however, I prefer not unnecessarily to give a final opinion on this point: and I think it is unnecessary to do so, because, having heard all that could be said for the plaintiffs in the argument of Sir *Fitzroy Kelly*, I think the plaintiffs are liable to be rated in respect of the property in question. Judgment for the defendants.(*a*)

(*a*) A writ of error is pending,—M. T. 1861.

BAILEY and Another *v.* SWEETING. *Jan.* 17.

A. upon one and the same occasion bought several parcels of goods of B., one parcel (consisting of chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*) for ready money, the rest (some of which had to be manufactured) on credit. The goods were sent to A. at different times. The chimney-glasses being damaged in the carriage, A. declined to receive them. A. afterwards, in answer to an application by B. for payment for the whole of the goods, wrote to him in substance as follows:—"The only parcel of goods selected for ready money was the chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*, *which goods I have never received, and have long since declined to have, for reasons made known to you at the time:* with regard to the rest, I am ready to pay," &c.

An action having been brought to recover the value of the whole of the goods, A. paid into court sufficient to cover all but the price of the chimney-glasses, and the jury found that the chimney-glasses were sold under a separate contract from the rest of the goods:—Held, that the letter,—inasmuch as it contained an admission of the bargain and of all the substantial terms of it,—was a sufficient note or memorandum of the contract to satisfy the 17th section of the Statute of Frauds, notwithstanding the subsequent attempted repudiation of liability.

THIS was an action brought to recover a sum of 76*l.* 14*s.* 3*d.* for goods bargained and sold. The defendant paid 38*l.* 8*s.* 9*d.* into court, and as to the rest of the claim pleaded never indebted.

At the trial before Erle, C. J., at the sittings in London after last Easter Term, the following facts appeared in evidence:—The defendant was a furniture dealer at Cheltenham: the plaintiffs were manufacturing upholsterers and cabinet makers in London. In July 1859, the defendant called at the plaintiffs' place of business in London, and then
*844] purchased five *chimney-glasses (a "job lot," as it was called), *which were to be paid for by check on delivery*. He at the same time purchased other goods *on credit* to the amount of 39*l.* 10*s.* 19*d.*, some of which had to be made for him. The chimney-glasses were packed and sent by carrier, addressed to the defendant at Cheltenham. They were, however, found to be so damaged when they reached their destination that the defendant refused to receive them, and at once communicated such refusal to the plaintiffs.

The other goods were subsequently forwarded at three different times, with separate invoices, and were duly received by the defendant. The value of these parcels was covered by the payment into court: and the

question was, whether the defendant was liable in respect of the chimney-glasses, the value of which with the cases was 38*l.* 10*s.* 6*d.*

On the part of the plaintiffs it was insisted that the whole of the goods were sold under one contract, and that the case was taken out of the Statute of Frauds (29 Car. 2, c. 3, s. 17) by the acceptance of part. They also relied upon the following letter addressed to them by the defendant, as being a sufficient memorandum to satisfy the requirements of that statute:—

"Cheltenham, December 3d, 1859.

Gentlemen,—In reply to your letter of the 1st instant, I beg to say that the only parcel of goods selected for ready money was, the chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*, which goods I have never received, and have long since declined to have, for reasons made known to you at the time. With regard to the other items, viz. 11*l.* 4*s.* 9*d.*, 14*l.* 13*s.* and 13*l.* 13*s.*, for goods had subsequently (less cases returned), those goods are I believe subject to the usual discount of 5*l.* per cent.; and I am quite ready to remit you cash for these parcels at once, and, on receipt of your reply to *this letter, will instruct a friend to call on you and settle accordingly." [*845

For the defendant it was insisted that the contract for the chimney-glasses was a separate and distinct contract, and void for want of a sufficient memorandum.

His lordship (at counsel's request) left it to the jury to say whether the bargain for the chimney-glasses was a separate and distinct bargain from that for the rest of the goods, telling them, that, if they were of that opinion, they must find for the defendant.

The jury found that the two were separate and distinct transactions, and accordingly returned a verdict for the defendant.

Hawkins, Q. C., in Trinity Term last, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the plaintiffs for 38*l.* 10*s.* 6*d.*, on the ground that the defendant's letter of the 3d of December, 1859, was a sufficient memorandum or note in writing to satisfy the statute, or for a new trial on the ground that the verdict was against evidence.

H. James and *Tompson Chitty* showed cause.—The whole was not necessarily one contract because all the goods were purchased at one and the same visit to the warehouse. In truth, the contract for the chimney-glasses for ready money was totally distinct from that for the other goods, which were bought on credit. It was clearly a question for the jury: Scott *v.* The Eastern Counties Railway Company, 12 M. & W. 33.† Here, the evidence shows that there were two distinct bargains. [ERLE, C. J.—In Baldey *v.* Parker, 2 B. & C. 37 (E. C. L. R. vol. 9), 3 D. & R. 220 (E. C. L. R. vol. 16), A. went to the shop of B. & Co., linen-drapers, and contracted for the purchase of various articles, each of which was under the value of 10*l.*, but *the whole amounted to 70*l.*: a separate price for each article was agreed upon; some A. marked with a pencil, others were measured in his presence, and others he assisted to cut from larger bulks. He then desired that an account of the whole might be sent to his house, and went away. A bill of parcels was accordingly sent, together with the goods, when A. refused to accept them: and it was held that this was all one contract, and therefore within the 29 Car. 2, c. 3, s. 17. KEATING, J.—Bigg *v.* [*846

Whisking, 14 C. B. 195 (E. C. L. R. vol. 78), is much to the same effect, and there the different parts of the contract were arranged at several different places. ERLE, C. J.—Holroyd, J., says in Baldey v. Parker, "The intention of the statute was that certain requisites should be observed in all contracts for the sale of goods for the price of 10*l.* and upwards. This was all one transaction, though composed of different parts. At first it appears to have been a contract for goods of less value than 10*l.*, but in the course of the dealing it grew to a contract for a much larger amount. At last, therefore, it was one entire contract within the meaning and mischief of the Statute of Frauds; it being the intention of that statute, that where the contract, either at the commencement or at the conclusion, amounted to or exceeded the value of 10*l.*, it should not bind, unless the requisites there mentioned were complied with. The danger of false testimony is quite as great where the bargain is ultimately of the value of 10*l.*, as if it had been originally of that amount. It must therefore be considered as one contract within the meaning of the act." The court there dealt with it as a question of law.] In Baldey v. Parker, the buyer directed an invoice of the whole to be sent to him. That made it all one contract. So, in Bigg v. Whisking, there was one memorandum embracing all the timber. And in Scott v.
*847] *The Eastern Counties Railway Company there was but one order given. "One transaction" is a somewhat ambiguous expression. On a sale by auction, though the same person is the buyer of several lots, each lot forms the subject of a distinct contract: James v. Shore, 1 Stark. N. P. C. 426 (E. C. L. R. vol. 2); Emmerson v. Heelis, 2 Taunt. 38; Roots v. Lord Dormer, 4 B. & Ad. 77 (E. C. L. R. vol. 24); Franklyn v. Lamond, 4 C. B. 637 (E. C. L. R. vol. 56).(a) The more important question, however, is, whether the defendant's letter of the 3d of December, 1859, was a sufficient note or memorandum of the bargain to satisfy the statute. The subject is adverted to in Mr. Justice Blackburn's treatise on the Contract of Sale, p. 66, where the learned author says: "It sometimes happens, that, after a dispute has arisen, a party in a letter signed by him recapitulates the whole terms of the bargain, for the purpose of saying that the bargain is at an end for some reason which is evidently insufficient in law. It has never been decided whether such an admission of the terms of the bargain, signed for the express purpose of repudiation, can be considered a memorandum to make the contract good; but it seems difficult on principle to see how it can be so considered. The parties may either of them put an end to the contract at any time whilst it is not good, with cause or without cause; and a memorandum of the terms comes too late to make a con-
*848] tract good which is *already put an end to. There is evidently a great difference between a writing which, after the dispute has arisen, mentions the terms of the contract for the purpose of showing that the bargain is at an end, and one which recognises them as still subsisting. I know only of three cases in which this point could

(a) In Franklyn v. Lamond, the plaintiff was the purchaser at a public auction of three lots of one hundred railway shares each; and Maule, J., says: "As each lot was knocked down to the plaintiff, there was a distinct contract for the sale of one hundred shares, which would be satisfied by the delivery of any shares in that company to that amount. But the subsequent delivery and receipt of the three hundred shares, with the bill of parcels produced, and the payment of the 15*l.*, showed that the parties treated the transaction as one entire sale of three hundred shares."

have been decided; and, though in each of them the memorandum was held insufficient, they seem to have been decided on special grounds. In Cooper *v.* Smith, 15 East 103, in 1812, the decision of the court seems to have turned on the fact of the note containing terms materially different from those of the bargain declared on and proved. In Richards *v.* Porter, 6 B. & C. 437 (E. C. L. R. vol. 13), 9 D. & R. 497 (E. C. L. R. vol. 22), in 1827, the defendant wrote to the plaintiffs,—'The hops, five pockets, which I bought of Mr. Richards on the 23d of last month, are not yet arrived, nor have I ever heard of them. I received the invoice. The last was much longer than they ought to have been on the road; however, if they do not arrive in a few days, I must get some elsewhere.' The plaintiffs were nonsuited, and the King's Bench held the nonsuit right. Lord Tenterden said: 'I think this letter is not a sufficient note or memorandum in writing of the contract to satisfy the Statute of Frauds. Even connecting it with the invoice, it is imperfect. If we were to decide that this is a sufficient note in writing, we should in effect hold, that, if a man were to write and say, I have received your invoice, but I insist upon it that the hops have not been sent in time, that would be a note or memorandum sufficient to satisfy the statute. I think the case of Cooper *v.* Smith, 15 East 103, in substance is not distinguishable from this.' In Smith *v.* Surman, 9 B. & C. 561 (E. C. L. R. vol. 17), 4 M. & R. 455, in 1829, the plaintiff's attorney wrote to the defendant,—'Sir,—I am directed by Mr. Smith, of Norton Hall, to request you will forthwith pay for the *ash timber which you [*849 purchased of him. The trees are numbered from 1 to 19, and contain on a fair admeasurement 229 feet, 7 inches. The value, at 1*s.* 6*d.* per foot, amounts to 17*l.* 8*s.* 6*d.* I understand your objection to complete your contract, is, on the ground that the timber is faulty and unsound; but there is sufficient evidence to show that the same timber is very kind and superior, and a superior marketable article. I understand you object to the manner in which the trees were cross cut; but there is also evidence to prove they were so cut by your direction. Unless the debt is immediately discharged, I have instructions to commence an action against you.' The defendant wrote in answer,—'Sir, I have this moment received a letter from you, respecting Mr. Smith's timber, which I bought of him at 1*s.* 6*d.* per foot, to be sound and good, which I have some doubt whether it is or not; but he promised to make it so, and now denies it. When I saw him, he told me I should not have any without all, so we agreed upon these terms, and I expected him to sell it to somebody else.' This was held not a sufficient note or memorandum of the bargain. Bayley, J., seems to have formed his judgment partly because the vendee did not recognise the bargain as a binding bargain; the other two judges, Littledale and Parke, only say that the letters were inconsistent." In Taylor *v.* Wakefield, 6 Ellis & B. 765, it was verbally agreed between the owner of goods and a person who was in possession of those goods as his tenant, that the tenant might, if he pleased, at the termination of his tenancy, purchase the goods for a sum exceeding 10*l.*, but was not to take them till the money was paid. At the expiration of the tenancy, the buyer tendered the price; but it was refused by the vendor, who denied the validity of the bargain. After this the buyer proceeded to take *away the goods: the vendor [*850 prevented him, and took possession of them. In trover by the

buyer against the vendor, it was held, that, on these facts, there was no evidence to go to the jury of an acceptance and actual receipt to bind the bargain; as, at the time when the buyer took to the goods as owner, the parol contract had been already disaffirmed by the vendor. [WILLES, J.—That was a very peculiar case: there was no acceptance there with the assent of the vendor.] The letter of the 3d of December was not a note or memorandum of the contract: it does not contain the terms of the bargain; and it is an express repudiation of the contract. "The object of the statute was, that the note in writing should exclude all doubt as to the terms of the contract:" per Bayley, J., in Smith *v.* Surman, 9 B. & C. 569. The memorandum must at all events show what the defendant's *promise* is: Egerton *v.* Mathews, 6 East 307. That this letter does not. The word used is "selected," not "purchased," which clearly would not be enough in a bought and sold note. Under the statute of limitations, there is no case where a subsequent writing has been held to prevent the operation of the statute, unless it admits the contract to be still binding. "When it is ascertained," says Lord Abinger in Johnson *v.* Dodgson, 2 M. & W. 653, 659,† "that the defendant meant to be bound by it as a complete contract, the statute is satisfied, there being a note in writing showing the terms of the contract, and recognised by him." If this had been a simple acknowledgment containing or referring to some other document containing the terms of the contract, it might have sufficed: Allen *v.* Bennet, 3 Taunt. 169; Saunderson *v.* Jackson, 2 Bos. & P. 238; 3 Esp. N. P. C. 180; Jackson *v.* Lowe, 1 Bingh. 9 (E. C. L. R. vol. 8), 7 J. B. Moore 219 (E. C. L. R. vol. 17); Dobell *v.* Hutchinson, 3 Ad. & E. 355 (E. C. L. R. vol. 30), 5 N. & M. 251 (E. C. L. R. vol. 36). Here, however, the effect of the
*851] *acknowledgment contained in the first part of the defendant's letter of the 3d of December is destroyed and the whole rendered inoperative by the subsequent repudiation of the contract. In Cooper *v.* Smith, 15 East 103, a memorandum in writing of a contract for the purchase of flour by the defendant of the plaintiff, a miller, taken by the plaintiff's traveller in his common order-book in these terms,—19th Feb. 1811, of John Smith, 64*l.*" (which was explained by the witness to mean so much received of the defendant in satisfaction of a former order), "Do. 40 of 3, 58/" (which was explained to mean a new order for forty sacks of flour called "thirds," at 58*s.* per sack), and this without any signature,—was held not to be a sufficient memorandum in writing of the bargain within the 17th section of the statute of frauds, to bind the defendant: and it was further held that such defective memorandum could not be supplied by a letter written afterwards by the defendant, in which, *though he recognised the order*, he insisted that the flour had not been delivered in time, and therefore he was not bound to take it; and that it was not competent to the plaintiff to prove, by the parol testimony of the person who took the order, that there was no such term in the contract as to deliver the flour within a given time. "The plaintiff cannot," said Lord Ellenborough, "avail himself of that letter as evidence of the contract for one purpose, to bind the defendant within the statute, and renounce it for another purpose; but he must take it all together; and then it falsifies the contract proved by parol testimony for the plaintiff." Richards *v.* Porter, 6 B. & C. 437 (E. C. L. R. vol. 13), 9 D. & R. 497 (E. C. L. R. vol. 22), is to the same effect:

and in Smith *v.* Surman, 9 B. & C. 561 (E. C. L. R. vol. 17), 4 M. & R. 455, Bayley, J., says: "I agree, that, if there had been a letter written by the seller (or his agent) to the buyer, *specifying the terms of a contract, and the buyer in his answer had recognised [*852 that contract, there would have been a note in writing of the bargain, sufficient to satisfy the statute. But the defendant in this case does not recognise the contract stated in the letter of the plaintiff's attorney. The contract as described in the two letters differs essentially as to the quality of the things to be sold. It is clear, therefore, that the vendee did not consider it a binding bargain. What the real terms of the contract were, is left in doubt, and must be ascertained by verbal testimony. The object of the statute was, that the note in writing should exclude all doubt as to the terms of the contract, and that object is not satisfied by the defendant's letter." In Haughton *v.* Morton, 5 Irish Common Law Rep. 329, to an action for a breach of contract, by the non-delivery of a cargo of wheat, sold by sample, the defendants pleaded that there was no delivery or memorandum in writing of the sale; and on this defence the following issues were taken,—first, whether the plaintiff accepted any part of the goods and actually received the same,—and, secondly, whether there was a memorandum in writing signed by the defendants. In support of these issues, the plaintiff proved an entry made by the defendants in a memorandum book, dated the 10th of October, 1854, but not signed by them, as follows,—"B. Haughton, about 800 barrels Ghorka wheat ex Liverpool, at 38*s.*; payment, half cash and half bill at three months." This contract not being executed, owing to the loss of the vessel carrying the goods, the plaintiff applied by letter for compensation, to which the defendants replied, admitting the sale, but stating that it was subject to certain conditions agreed on by the plaintiff. On this evidence the judge left the case to the jury on the second issue, telling them, that, if they believed the *entry in the book contained the terms of the agreement for the sale, [*853 and that the letters of the defendants referred to such entry, the same was a sufficient note in writing to satisfy the Statute of Frauds. The court held,—dissentiente Lefroy, C. J.,—that this was a misdirection.(*a*) [KEATING, J.—In all the cases you rely upon, the letter contains a recognition of a contract materially different from the actual contract.] In Goode *v.* Job, 28 Law J., Q. B. 1, it was held, that, if a person through whom the defendant in an action of ejectment claims has in an answer sworn by him to a bill filed by the plaintiff in reference to the same property, acknowledged the title of the plaintiff within twenty years of the time of the action being brought, such acknowledgment will be evidence against the defendant, and will operate as a bar to the Statute of Limitations, under the 3 & 4 W. 4, c. 27, s. 14. But, in Rondeau *v.* Wyatt, 2 H. Bl. 63, an admission of a contract in an answer to a bill in Chancery was held not to be a sufficient memorandum within the Statute of Frauds. And this view is adopted in Mitford on Pleadings in Equity, 5th edit. 311. This being the state of the authorities, the court will, it is submitted, in the absence of any cogent reasoning to the contrary, adopt the conclusion arrived at by Mr. Justice Blackburn, and hold this acknowledgment to be insufficient. Further, in order to maintain this action, the plaintiff must prove that the property in the

(*a*) See Bradford *v.* Roulston, 8 Irish Common Law Rep. 468.

goods vested in the defendant at the time of the contract. Now, the letter, which alone can be relied on to prove the contract, was not written until five months after the oral bargain was made. When did the property vest? Clearly not until the 3d of December. Whose goods were
*854] they in the mean time? [WILLES, J.—There might *have been something in this point, if the goods had been burnt in the interim.] In the notes to Birkmyr *v.* Darnell (Salk. 27), in 1 Smith's Leading Cases, 4th edit., p. 233, it is said: "A vendee cannot, where the contract of sale is invalid by the statute, effect an insurance on the goods,—Stockdale *v.* Dunlop, 6 M. & W. 224;† nor, it seems, could he bring an action against the carrier, treating the vendor as his agent to forward: see Coats *v.* Chaplin, 3 Q. B. 483 (E. C. L. R. vol. 43), 2 Gale & D. 552. Also it is observable that the written memorandum must exist before action, and in that respect differs from *mere* evidence: Bill *v.* Bament, 9 M. & W. 36:† see Fricker *v.* Thomlinson, 1 M. & G. 772 (E. C. L. R. vol. 39). And indeed, attending to the distinction pointed out by the Lord Chancellor (Cottenham) in Dale *v.* Hamilton, 2 Phillips 266, between agreements and declarations of trust,—'that, in the one, it is the agreement itself, which is the origin of the interest, that must be in writing; in the case of a declaration of trust, which is only the recognition of a pre-existing interest, it is the evidence and recognition, and not the origin of the transaction, that must be in writing,' it may be difficult to impute any retroactive effect to the subsequent written memorandum of an agreement within the statute, not originally reduced into writing."

Hawkins, Q. C., and *Kemplay*, in support of the rule.—Baldey *v.* Parker, 2 B. & C. 37 (E. C. L. R. vol. 9), 3 D. & R. 220 (E. C. L. R. vol. 16), and the cases which have followed it, show that the jury came to a wrong conclusion in this case, assuming the question to have been properly for them. The main question, however, is, whether the defendant's letter of the 3d of December was a sufficient note or memorandum of the bargain to satisfy the 17th section of the statute. The first objection made to it, is, that it does not contain an admission of the
*855] terms of the *contract. In substance it is,—"I selected for ready money" (which means, I selected and agreed to pay ready money for them) "certain chimney-glasses, the price of which was 38*l.* 10*s.* 6*d.*" That which follows is no denial or repudiation of the contract, but a mere statement that for some reason the defendant wished to avoid the performance of it. [WILLIAMS, J.—It cannot be laid down broadly that a mere recital of a contract will constitute a note or memorandum within the statute.] In Jackson *v.* Lowe, 7 J. B. Moore 219 (E. C. L. R. vol. 17), 1 Bingh. 9, the purchaser of flour gave a notice in writing to the seller, who had delivered part of it, that it was of bad quality, and unsaleable, and required him to take it away: in this notice the quantity, quality, price, and time of delivery were stated: the attorney for the vendor answered this, stating that the vendor had performed his contract as far as it had gone, and was ready to complete the remainder: and it was held that the two documents together constituted a sufficient note or memorandum of the bargain to satisfy the statute. [ERLE, C. J.—I do not think you need labour that.] The next objection is, that the letter contains an express repudiation or disclaimer of the contract, and therefore the statute is not satisfied: and for this the passage cited

from Mr. Justice Blackburn's book is relied on. No authority, however, is cited to support the proposition there laid down. [WILLIAMS, J. —My Brother Blackburn admits that there is no authority for it; but he gives his own reasons for the opinion he advances. When do you say the property passed by this contract?] At the time of the original bargain in July. [WILLIAMS, J.—Indeed!] It is not necessary to contend for that, though it seems to be borne out by the language of the 17th section: it is not the "contract" which is required to be in writing, but "some note or memorandum of the contract." *[WILLIAMS, J.—A memorandum given after action brought will not do: Bill *v.* Bament, 9 M. & W. 36.† The reason given is, that the cause of action is not complete until the memorandum is given. Parke, B., there says: "There must, in order to sustain the action, be a *good contract* in existence at the time of action brought; and, to make it a good contract under the statute, there must be one of the three requisites therein mentioned. I think, therefore, that a written memorandum, or part payment, after action brought, is not sufficient to satisfy the statute."] That is somewhat at variance with the dictum of Maule, J., in Fricker *v.* Thomlinson, 1 M. & G. 772 (E. C. L. R. vol. 39),—"The case in the Exchequer(*a*) decided that the Statute of Frauds only altered the evidence of the contract, and did not, like the Statute of Anne,(*b*) make the contract itself void: and, if that be so, a memorandum of the contract made after action brought would be sufficient: and why, then, should not an acceptance of goods after action brought be admissible in evidence?" [WILLES, J.—According to Coats *v.* Chaplin, 3 Q. B. 483 (E. C. L. R. vol. 43), 2 Gale & D. 552, and that class of cases, the buyer could not have sued the carrier for the damage done to the goods at the time the negligence occurred. Could he put himself in a better position in this respect by a written acknowledgment?] His acknowledgment would have a retroactive effect. [WILLES, J.—Suppose the vendors had brought their action against the carrier, and the vendee wrote the letter which perfected his contract the day before the trial, what would be the effect of that?] It may well be that the carrier may owe a duty to both. In all the cases cited on the part of the defendant, the contract had *either been repudiated before the letter was written, or the parties were not at one as to the terms of the contract. [*856 [*857

ERLE, C. J.—This was an action for goods sold and delivered. There was an oral contract for the sale and delivery of the goods in question: but the defendant relies upon the Statute of Frauds, and contends that there was no note or memorandum of the bargain in writing to satisfy that statute. After the making of the oral contract, however, there was a letter written by the vendee to the vendors, which contains this statement,—"The goods selected for ready money was the chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*" (the goods in dispute), "which goods I have never received, and have long since declined to have, for reasons made known to you at the time,"—the reason being, that, in consequence of the negligence of the carrier through whom they were sent, the goods were damaged. Now, the first part of that letter is unquestionably a note or memorandum of the bargain: it contains a

(*a*) Elliott *v.* Thomas, 3 M. & W. 170.†
(*b*) The Copyright Act, 8 Anne, c. 19, s. 1.

description of the articles sold, the price for which they were sold, and all the substantial parts of the contract. If it had stopped there, there could be no dispute as to its being a sufficient note or memorandum to satisfy the statute. It is clear that the note or memorandum may be made after the time at which the oral contract takes place; and, to my mind, that which passed orally between the parties on the subject of the bargain in July, was in the nature of an inchoate contract, and the subsequent letter had a retroactive effect, making the contract good and binding. The latter part of the defendant's letter in effect says, "I decline to take the goods because the carrier damaged them in their transit:" and it is contended on his part, that the acknowledgment at
*858] the beginning *of the letter does not constitute a sufficient memorandum within the statute, because the latter part contains a repudiation of his liability,—relying much on the passage cited from my Brother Blackburn's book on the Contract of Sale, where it is suggested that a subsequent acknowledgment in writing has not the effect of making the contract good, if it is accompanied by a repudiation of the defendant's liability under it. A case is referred to, of Rondeau *v.* Wyatt, 2 H. Bl. 63, where an answer to a bill of discovery, in which the defendant admitted the agreement, was held not to preclude him from taking the objection that there was no note or memorandum to satisfy the Statute of Frauds. We have adverted to the authorities cited in Mr. Justice Blackburn's book, and to the case of Rondeau *v.* Wyatt; but we find no decided authority upon the point in judgment. In that state of the authorities, we are remitted to the Statute of Frauds itself: and, upon reference to its language, we think the defendant's letter does amount to a sufficient memorandum in writing, and makes the contract good. The purpose of the statute was, to prevent fraud and perjury. Now, the danger of perjury in this case is effectually prevented by the letter of the defendant; for, he distinctly admits that he made the contract, and at the price alleged. I do not consider that the defendant intended to deny his liability by reason of the absence or insufficiency of the contract: but that the only question which he intended to raise, was, whether he or the plaintiffs should settle with the carriers for the damage done to the goods. I think that constitutes a material distinction between the present case and those cited, in which the defendant, admitting the contract, has rested his defence on the non-compliance with the statute. But, if there be no such distinction, and we are called upon to consider whether the doctrine suggested
*859] *in my Brother Blackburne's book correctly represents the law upon this subject, with the highest respect for that clear-headed and highly eminent judge, I must say that I am unable to give my assent to his proposition. I think the purpose of the Statute of Frauds is answered by the defeudant's letter, and that the plaintiffs are entitled to recover.

WILLIAMS, J.—I am entirely of the same opinion. It cannot for a moment be controverted here, that in point of fact there was a good and lawful contract between the plaintiffs and the defendant for the sale of the goods in question. But it is equally clear, that, as the price of the goods bargained for exceeded the value of 10*l.*, the contract was not an actionable one unless the requisites of the 17th section of the Statute of Frauds were complied with; that section enacting, "that no contract

for the sale of any goods, wares, and merchandises for the price of 10*l.* sterling or upwards, shall be allowed to be good, except (1) the buyer shall accept part of the goods so sold and actually receive the same, or (2) give something in earnest to bind the bargain or in part of payment, or (3) that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

The effect of that enactment, is, that, although there is a contract which is a good and valid contract, no action can be maintained upon it, if made by word of mouth only, unless something else has happened, ex. gr. unless there be a note or memorandum in writing of the bargain signed by the party to be charged. As soon as such a memorandum comes into existence, the contract becomes an actionable contract. The question, therefore, in the present case, is, whether such a memorandum has come into existence. It is plain to *my mind that the terms [*860
of the defendant's letter of the 3d of December do constitute such a memorandum as the statute contemplated. It completely recites all the essential terms of the bargain: and the only question is whether it is the less a note or memorandum of the bargain, because it is accompanied by a statement that the defendant does not consider himself liable in law for the performance of it. There is nothing in the statute to warrant that. I think the statute is satisfied, and that the contract is an actionable contract. It is said that there may be a difficulty in maintaining this doctrine, in consequence of the inconvenience which may arise from the property not passing by the contract until it has become capable of being enforced by action. That may be true: but the same may be said as to part acceptance or the payment of earnest, and yet nobody ever suggested a doubt that an action might be brought upon a verbal contract where either of these things has taken place. I entirely agree with my Lord in his appreciation of my Brother Blackburn's book: but, after fully considering the proposition which has been cited from it, and the reasoning upon which that proposition is based, I feel bound to say that I do not consider it satisfactory. The right of the defendant to put an end to the contract, if any such right existed, ought not to affect the question whether there was a valid contract or not. There was a valid contract, and the memorandum was a sufficient memorandum. The intention of the defendant to repudiate or abandon the contract cannot affect the question as to the sufficiency or insufficiency of it.

WILLES, J.—I am of the same opinion. No doubt there was a contract between the plaintiffs and the defendant for the purchase of the goods in question by *the latter, and, assuming it to be a good [*861
contract, the defendant would be bound to pay the price. At common law, it is clear that the plaintiffs would have a good cause of action: but it is insisted that no action can be maintained, by reason of the 17th section of the Statute of Frauds. I found my opinion in favour of the plaintiffs entirely upon the construction of that section; for, there is no authority on either side, except the passage quoted from my Brother Blackburn's book. It is impossible that anybody can attribute more weight than I do to anything that falls from that learned judge: but, whatever distrust I may under the circumstances be disposed to entertain, I must still act upon my own opinion. Look at the

words of the statute. They are, "No contract for the sale of any goods, &c., shall be allowed to be good, except,—that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." It follows from these words, that, if there be any note or memorandum in writing of the bargain signed by the party to be charged, the contract is to be allowed to be good as at common law. Unquestionably there is in the present case a note or memorandum in writing; and upon the true construction of the statute, I think, a sufficient note. The defendant in the letter says,—"I selected the goods for ready money; and the price agreed on was 38*l.* 10*s.* 6*d.*" That clearly is a memorandum containing the terms of the bargain. It is urged that this letter was not a sufficient note or memorandum to satisfy the statute, because it is accompanied by a statement showing that the defendant did not wish to be bound by the contract. It seems to me that to hold that that circumstance is to operate to prevent the letter being such a memorandum as the statute *contemplated, would be depriving the word "some," or the correlative word "any," of its natural meaning and effect. The requisites of the statute have been complied with: and there is nothing in the statute to say that the note or memorandum is to be defeated by any collateral circumstances. Upon that simple ground, it seems to me that this contract stands good, and that the plaintiffs are entitled to recover.

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KEATING, J.—I am of the same opinion. No doubt the contract in this case was good if evidenced by writing. The object of the Statute of Frauds was, to provide the certainty of written evidence for the uncertainty of oral evidence of contracts. The defendant's letter of the 3d of December does contain all the terms of the bargain between these parties. It is said that that letter ceases to be a note or memorandum of the contract, because the defendant has thought fit to add to it an intimation that he does not wish or intend to be bound by it. It seems to me, however, that that statement cannot be allowed to vary the operation of the previous words of the letter, which amount to a clear acknowledgment of the terms of the bargain. I should not have entertained the slightest doubt upon the subject, but for the passage quoted from Mr. Justice Blackburn's book. But the learned author merely throws it out as an intimation of opinion, which he admits to have no authority or even dictum in its favour. For these reasons, I concur with the rest of the court in thinking that the rule to enter a verdict for the plaintiffs for 38*l.* 10*s.* 6*d.* should be made absolute.

Rule absolute accordingly.

HUTCHINSON and Others *v.* COPESTAKE and Another. *July* 8.

In an action for obstructing ancient lights, the facts stated in a special case were as follows:—The plaintiffs and defendants possessed premises opposite to each other in the city of London; the plaintiffs' premises, in which were windows which had been used for more than twenty years, having been burnt down, the plaintiffs rebuilt them, but, in the newly erected building, the windows were placed in different situations, were of different sizes, and altogether occupied more space than those in the old building; some parts of the new windows coincided with some parts of the old ones, but a great portion of the old and new windows did not coincide.

In the special case it was stated that "the defendants could not have obstructed the passage of light to such portions of the windows of the plaintiffs' new building as were new, without at the same time obstructing the passage of light to such portions of the plaintiffs' windows as were in the sites of the old windows, to the extent stated in the declaration:"—

Held, by the Exchequer Chamber,—affirming the judgment of the court below,—that, as none of the new windows occupied the same position as any one of the ancient windows did, no right was acquired in respect of any of them against the plaintiffs.

THIS was a writ of error upon a judgment of the Court of Common Pleas upon a special case, in which that court held,—in conformity with the rule laid down by the Court of Queen's Bench in Renshaw *v.* Bean, 18 Q. B. 112,—that an action will not lie for the obstruction of ancient lights, the position of which has been so altered by the rebuilding of the premises within twenty years that the defendant could not exercise his right to obstruct such portions of the lights as were unprivileged, without at the same time obstructing the privileged portions. See the case set out, 8 C. B., N. S. 102.

The case was argued at the sittings after Easter Term, 1861, before Crompton, J., Bramwell, B., Channell, B., Hill, J., and Blackburn, J., by

Montague Smith, Q. C. (with whom was *Coxon*), for the plaintiffs, and by

Hawkins, Q. C. (with whom was *Phear*), for the defendants.

*The arguments were substantially a repetition of those urged in the court below. The following authorities were cited: Luttrel's Case, 4 Co. Rep. 87 a, Chandler *v.* Thompson, 3 Campb. 80, Cotterell *v.* Griffiths, 4 Esp. N. P. C. 69, Garritt *v.* Sharp, 3 Ad. & E. 325 (E. C. L. R. vol. 30), 4 N. & M. 834 (E. C. L. R. vol. 30), Blanchard *v.* Bridges, 4 Ad. & E. 176 (E. C. L. R. vol. 31), 5 N. & M. 567 (E. C. L. R. vol. 36), Hall *v.* Swift, 4 N. C. 381 (E. C. L. R. vol. 32), 6 Scott 167, Thomas *v.* Thomas, 2 C. M. & R. 34,† 5 Tyrwh. 804, Wilson *v.* Townsend, 9 Weekly Rep. 81, Cooper *v.* Hubbuck, 9 Weekly Rep. 352, Cawkwell *v.* Russell, 26 Law J., Exch. 34, and Gale on Easements, 2d edit., pp. 331, 354, 361, 363. [*864

Cur. adv. vult.

CROMPTON, J.—The plaintiffs in this case alleged that they were possessed of a certain shop and a warehouse in which there were of right divers windows, through which light and air ought to have entered, and that the defendants built and continued a wall and building near to the said windows, whereby the light and air were hindered and prevented coming through the windows into the shop or warehouse.

At the trial a verdict was taken for the plaintiffs, subject to a special case, upon which the Court of Common Pleas gave judgment for the defendants.

It appeared from the special case that the plaintiffs' and the defendants' premises were situate opposite each other in Bread Street, in the city of London; and that the plaintiffs' premises, in which the windows had been used for more than twenty years, having been burnt down, were rebuilt. It appeared from the special case and the tracings accompanying it, which were made part of the case, that in the newly-erected buildings, the windows were placed in different situations, were of different sizes, and altogether occupied more space than the windows in the old buildings. Some parts of some of the new windows coincided *865] *with some parts of the old; but a great portion of the old and new did not coincide.

It was expressly stated in the case that "the defendants could not have obstructed the passage of light to such portions of the windows of the plaintiffs' present warehouse as are new, without at the same time obstructing the passage of light to such portions of the plaintiffs' windows as are in the sites of the old windows, to the extent stated in the declaration."

On the argument before us, the defendants contended that the new windows were not substantially the same as the old ones, and that, as it was found in the case that the new portions of the windows could not be obstructed without obstructing the portions in the site of the old windows, the case fell within the authority of Renshaw v. Bean, 18 Q. B. 112 (E. C. L. R. vol. 83).

The plaintiffs, on the contrary, contended that the new lights were substantially the same as the old ones; that the same amount of light and air ought to have come to their building, by whatever apertures they chose to receive it; that no more burthen was cast on the servient tenement by the one set of windows than by the other; and that, even if the windows were substantially different, or increased in size, the defendants had no right to obstruct the portions of the old lights that formed parts of the new windows: and they impugned the authority of Renshaw v. Bean.

On comparing the tracings of the old and new buildings, and looking at the statements in the case, the old and new windows of the plaintiffs do not seem to me to be substantially the same: and I think, that, where, as in the present case, windows to which a right has been acquired are so far altered in their position and size, and confused with portions of new windows, that the owner of the servient tenement cannot prevent a right *866] being gained to the new windows *without obstructing such portions of the old windows as have been mixed up with the new lights, no right of action arises from such necessary obstruction of the remaining portions of the old windows.

When the origin of the right to windows is considered, it seems to be clear, according to the judgment of Patteson, J., in Blanchard v. Bridges, 4 Ad. & E. 176 (E. C. L. R. vol. 31), 5 N. & M. 567 (E. C. L. R. vol. 36), in which I entirely concur, that the lights in respect of which the right of action is sought to be enforced must be substantially the same as the lights which have been gained by user or grant; and that no new light can be substituted without the consent of the owner of the

servient tenement. The right to prevent the owner of the servient tenement from using his own land as he chooses, must arise from the consent of such owner or his predecessors; and that consent must, as observed by Mr. Justice Patteson, have reference to the state of things at the time when it is supposed to have taken place, and cannot fairly be extended beyond the access of light and air through the same aperture or one of the same dimensions and in the same position. Since the Prescription Act, 2 & 3 W. 4, c. 71, the right to light depends upon positive enactment, in cases falling within the provisions of that statute. By the 3d section of that act, it is enacted, that, "when the access and use of lights to and for any dwelling-house, &c., shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible." The extent of the right must be confined to that which has been actually enjoyed, and which the owners of the adjoining land did not interrupt; so that precisely the same reasons apply as did at common law.

The doctrine so well explained by the above learned judge (Patteson, J.), does not seem to me at all at *variance, as was suggested by Mr. *Smith* in his argument, with the observations of Lord Campbell in Renshaw *v.* Bean, where he says: "We by no means say, that, where the owner of a house alters the dimensions of an ancient window in it, he may in no case maintain an action for that which is an obstruction to it in its former state." This observation would be applicable ex. gr. to a case where an ancient window of three feet had an addition in height or breadth of three feet, which could be obstructed by a hoard or scaffolding, and where the old light, being distinguishable, need not be interfered with in blocking up the new. And I perfectly agree in Lord Campbell's observation as applicable to such a case. [*867

In the present case, the matter in respect of which the action is brought is not the thing granted or to which a right has been acquired by user. It is not the thing in respect of which the owners of the servient tenement have become subject to a restriction that they should not obstruct by doing any act on their own land which their pleasure or caprice may lead them to choose to do.

We were pressed with the argument that there was no greater amount of inconvenience to the servient tenement: and a case of Cooper *v.* Hubbuck was cited, where the Master of the Rolls was supposed to have held that a party having several windows in a house could put out an intermediate new window between two old ones, where no apparent detriment to the owner of the servient tenement appeared to arise therefrom.

I wholly dissent from this doctrine. I think that the right to restrict the owner of the adjoining land from building on his own land, gained by user or grant, must be confined to the subject-matter of such user or grant, and that the restriction on the owner of the *servient tenement must be substantially the same, according to the rule as laid down in Blanchard *v.* Bridges. [*868

I do not think that the owner of the old lights can say, "This new window I now put out will occasion you no harm, as you could not build so as to affect any of my lights before, and this new one will not abridge your power of building."

The new light is not one of the windows to which the original assent

was given; and it may be that the owner of the servient tenement would not have chosen to acquiesce if the window had been in the situation of the new window.

Suppose that a party has a back wall of his house with no windows, or very few windows opposite to the front of his neighbour's house,—the neighbour may very likely not object to a single window which may not annoy him by being opposite to particular parts of his own house. He may be good-natured enough not to object to two such windows, and may allow a right to be gained to them; whereas an intermediate window might have made all the difference, and might have prevented him from at all acquiescing in any lights.

On the other doctrine, an acquiescence in one important light, which gave no annoyance, might be made to operate so as to give a right to lights which might be a great annoyance and interference with the privacy of the servient tenement, and in which the owner of the servient tenement never would have acquiesced. Can it be the law, that a man who has one window in the front of his house can say to his neighbour,—"My one window is so situate as that any increase in your house would interfere with some rays of light falling upon it, and therefore I have a right to fill the back of my house with windows which you must not interfere with?"

*869] *I think that the true doctrine is, to confine the right to what the user points out. I do not, however, say that a right to have any quantity of lights that a person could put in his house, might not exist as against his neighbour. Such a right might be created by grant, and might probably be presumed from very peculiar circumstances; as, if the owner of the dominant tenement for a long course of years had continued to change his lights from time to time, and such changes had been acquiesced in from time to time for long periods: but, in general, the right must, I think, correspond with the user of the particular light or lights.

We were much pressed with the supposed hardship of the case. But I think, that, where a party has to rebuild his house, he should take care that he places the windows in their old situations, and makes them of the same size, and that, before he substitutes or adds lights substantially different in size or position, he should make a bargain with his neighbour: and I think that the hardship would be greater the other way, if the servient tenement could be made subject to a different set of lights than those to which the owner had assented, and which new lights might be such as he would have dissented from if originally proposed, and which might affect the privacy of particular parts of his tenement.

It was also asked, what would be the case if there were two adjoining buildings, and the owner of one of them should substantially alter the lights, so that the owner of the servient tenement opposite to both of them could not block up the new lights without blocking up the old lights of the adjoining neighbour? To this I answer, that, in the first place, the old lights, in respect of the obstruction of which an action

*870] would or might be brought, would be the same identical *unchanged lights; and, in the second place, that the owner complaining of the blocking up of his ancient lights would not by *his own* act have put the owner of the servient tenement into the situation of not

being able to block up the new lights without blocking up the old,—so that the very reason on which the case of Renshaw *v.* Bean was decided would not be applicable. I think that the new and old lights in the present case are not substantially the same, and that the old lights are by the act of the plaintiff so confused and mixed up with the new lights that the latter cannot be blocked up without obstructing the former, and therefore, that, according to the principles I have referred to, this action cannot be supported.

I am of opinion that the judgment of the court below should be affirmed.

My Brother Hill concurs in the above judgment.

BLACKBURN, J.—My Brother Channell and I concur in the judgment of my Brother Crompton, but are desirous of adding for ourselves, that, in the present case, in our opinion, no question arises as to the rights of the owner of adjacent land to use it so as to block up an ancient and unaltered window, on the ground that the person who has a right to that window has also opened a new one in such a position that the owner of the adjacent land must either block up the ancient window or submit to the enjoyment without interruption of the new window, so as after twenty years to make the right to the new window indefeasible.

We consider this a very different question, on which, if it was raised by the facts, we should be bound to deliver an opinion. As it is, without doing so, we rest our concurrence in affirming the judgment on the ground, that, on comparing the tracings, which are part of the case, we find that no one of the plaintiffs' present *windows substantially corresponds with an ancient window: and we draw the inference [*871 of fact that no one of the present lights claimed is a continuation of one of the ancient lights.

We perfectly concur in the reasoning of my Brother Crompton, by which he shows that the new and the old window may occupy in part the same space, without the right to light claimed through the new window being the same right as that enjoyed for twenty years without interruption through the old one.

BRAMWELL, B.—I concur in this judgment, solely on the ground that no one of the existing windows occupies the same position as any one of the ancient windows did, and consequently that by no one of them have the light and air been enjoyed for twenty years, and so no right has been acquired in respect of any of them against the plaintiffs.

Judgment affirmed.

See on the subject of ancient lights the American note to Stokoe *v.* Singers, 8 E. & B. 39; and in addition to the cases there cited against the application of the English doctrine to towns, see Carrig *v.* Dee, 14 Gray 583; Haverstick *v.* Sipe, 33 Penn. St. 368.

*872] *LEVY v. LEWIS. *Feb.* 1.

A. let premises to B. for a term which expired at Lady Day, 1858. B. had underlet them for the whole term to C., who continued in possession; and B. afterwards sued him for the half-year's rent accruing at Michaelmas, 1858. The only evidence to show that B. still continued tenant of the premises to A. was, that, *after action brought*, he paid to A. and A. accepted the half-year's rent which would have been due from him assuming his tenancy to have been still subsisting:—Held, in the Exchequer Chamber, by Wightman, J., Crompton, J., and Hill, J.,—dissentientibus Bramwell, B., and Channell, B.,—affirming the judgment of the court below,—that there was evidence for the jury that B.'s tenancy under A. continued, and consequently that the action was maintainable.

This was an appeal against a decision of the Court of Common Pleas, making absolute a rule for a new trial in an action for use and occupation: see the report, 6 C. B. N. S. 766 (E. C. L. R. vol. 95).

The facts were as follows:—The plaintiff held certain premises, being No. 16, Fetter Lane, in the city of London, as tenant to one John Knight, under a verbal agreement for three years from Lady Day, 1855; and he underlet them to the defendant for the same term. The term being about to expire, the defendant was desirous of continuing tenant under Knight, the superior landlord, and some negotiation took place between them, in the course of which the following letters were written by Knight to the defendant:—

18, Euston Square, 26th March, 1858.

"Mr. Lewis,

"Sir,—I have not (as I fully expected to have had) the key of No. 16 Fetter Lane left with me by this morning; and, on my going to the house to-day, I found it shut up and empty. I went there to give instructions for the repairs, and, not obtaining the key, I went to Mr. Levy's office in Catherine Street, when Mr. Levy told me it was his intention to keep the house on. I am therefore not in a position to proceed with our negotiation. I am up to to-morrow (Saturday the 27th instant) quite willing to take the house off Mr. Levy's hands, should he before the expiration of that time desire me to do so, and hand over the key: and I should in such case be ready (if you wish it) to treat with you. Should Mr. Levy, however, retain his present determination, I have given him my word to relet the premises to him.

"John Knight."

"18 Euston Square, 27th March, 1858.

*873] "Mr. Lewis.

"*Re* 16 *Fetter Lane.*

"Sir,—In answer to your note of yesterday, I beg to say you know perfectly well I had not (even by inference) entered into any agreement to let you the above-mentioned premises. If, as you state, you are in possession of them, such possession is not any of my giving you; and it rests entirely between yourself and Mr. Levy. I plainly told your friend Mr. Tylcoat, who called upon me for you, that I would not enter into an agreement to let the house to any new tenant until Mr. Levy had given me up possession thereof; but that, upon its coming into my possession, you shall have the first offer of it. It has not come into my possession. I shall not answer any further letters you may send to me on the matter; for, I will not trouble myself to enter into a paper

war on a subject respecting which we each know there is really nothing for us to write about.

"JOHN KNIGHT."

The defendant remaining in possession of the premises, the plaintiff sued him for half a year's rent from Lady Day to Michaelmas, 1858; and, after the commencement of the action, the plaintiff paid to Knight, who accepted the same, the half-year's rent which would be due from him in respect of the premises, assuming his tenancy to be still continuing.

Knight, who was called as a witness, stated, that, although nothing had occurred between himself and the plaintiff with reference to a renewal of the term prior to the payment of the rent, he still considered the plaintiff as his tenant.

Upon this evidence, Mr. Justice Willes, conceiving that there was no evidence to go to the jury of any new taking of the premises by the plaintiff from *Knight, or by the defendant from the plaintiff, [*874 nonsuited the plaintiff.

The majority of the Court of Common Pleas, however, thought there was evidence for the jury, and accordingly in Trinity Term, 1859, made a rule absolute for a new trial.

Against this decision the defendant appealed, and the case came on for argument in the Exchequer Chamber at the sittings after Hilary Term, 1860, the judges present being Wightman, J., Crompton, J., Martin, B. (during part of the argument only), Bramwell, B., Channell, B., and Hill, J.

H. Mills was heard for the appellant; and *H. James* for the respondent. The arguments were substantially the same as those urged in the court below. The following cases were cited,—Christy *v.* Tancred, 7 M. & W. 127,† Draper *v.* Crofts, 15 M. & W. 166,† Ibbs v. Richardson, 9 Ad. & E. 849 (E. C. L. R. vol. 36), 1 P. & D. 618, and Doe *v.* Harlow, 12 Ad. & E. 40 (E. C. L. R. vol. 40), and the notes in Tudor's Leading Cases on Real Property, p. 9.

WIGHTMAN, J.—I am of opinion that the majority of the Court of Common Pleas were right in holding that there was evidence from which a jury might infer a contract that the defendant should pay the plaintiff for the use and occupation of the premises in question. It appears that the plaintiff had held the premises under Knight under a verbal demise for three years, and had underlet them to the defendant for the same time; that, at the expiration of this term, viz. on the 25th of March, 1858, the defendant was in the occupation of them; that an application had been made by the defendant to Knight to let him (the defendant) have the premises, to which the landlord answers on the *26th of [*875 March as follows,—"I have not (as I fully expected to have had) the key of No. 16 Fetter Lane left with me this morning: and, on my going to the house to-day, I found it shut up and empty. I went there to give instructions for the repairs; and, not obtaining the key, I went to Mr. Levy's office in Catherine Street, when Mr. Levy told me that it was his intention to keep the house on. I am therefore not in a position to proceed with our negotiation. I am up to to-morrow (Saturday, the 27th instant) quite willing to take the house off Mr. Levy's hands, should he before the expiration of that time desire me to do so, and hand over

the key; and I should in such case be ready (if you wish it) to treat with you. Should Mr. Levy, however, retain his present determination, I have given him my word to relet the premises to him." It is clear from this letter that neither the plaintiff nor the defendant had delivered up the premises to Knight, the landlord. It may be fairly assumed that Mr. Levy did elect to retain the premises. Then comes the letter from Knight of the 27th, in which he definitively declines to let the premises to Lewis. Notwithstanding that letter, the defendant still kept in possession. This, coupled with the fact of the plaintiff having paid the half-year's rent to Knight for the premises, though after the commencement of this action, was some evidence to go to the jury of an agreement between the plaintiff and Knight that the former should continue to be his tenant. That being so, the only question is, of whom did the defendant hold? His contention is this, that, unless he became tenant to Knight, he was tenant to nobody. I do not think this is a just inference from the facts. I think the defendant must be assumed to have continued, in the absence of evidence to the contrary, to hold under the party under whom he originally entered into possession. The case
*876] *of Ibbs v. Richardson, 9 Ad. & E. 849 (E. C. L. R. vol. 36), 1 P. & D. 618, does not seem to me at all to militate against this view: on the contrary, the judgment of Littledale, J., in that case favours the doctrine that the possession of the sublessee is the possession of the lessee.

Crompton, J.—I also think that the judgment of the court below should be affirmed. The question for our decision is, whether there is any evidence of use and occupation of the premises by the defendant under the plaintiff. On the part of the defendant it is put,—first, that the plaintiff had no legal interest in the premises,—secondly, that there was no agreement that the defendant should continue to hold under the plaintiff. I do not think it necessary to say anything as to the position of a party holding over by his tenant. Cases have been cited to show that the holding over by one co-tenant does not enure as a holding over by the other. I agree with my Brother Wightman that there is evidence, from the letters and the conduct of the parties, that the holding by the defendant was under the plaintiff; and that there was ample proof that the premises were relet to the plaintiff, and that the defendant knew it. The plaintiff was liable to Knight for the rent, either under his contract or as holding over by his tenant. It is material to consider that the question was, not only whether the plaintiff would give up possession of the premises, but whether the defendant, who practically had the power of giving them up, would do so. Knight's letter of the 26th of March shows that he was willing to continue the plaintiff as his tenant, if the latter elected to remain so: and the letter of the 27th informs the defendant that the premises have not come into Knight's possession. I think the jury were at liberty to infer from this
*877] that Knight had relet the premises to the *plaintiff, and that the defendant knew it: and I think the fact of the receipt of the rent by Knight, though after action brought, was admissible in order to obviate an argument which might have rested on the part of the defendant on the absence of such payment and receipt. The only remaining question is, under whom did the defendant hold? He knew that he was not holding under Knight: and, if he was not holding under Knight,

I think the jury might fairly infer that he was holding under Knight's lessee, the plaintiff; for, he could not say he was a trespasser.

BRAMWELL, B.—I am of opinion that the judgment of the Court of Common Pleas ought to be reversed. The question is, whether there was any evidence to go to the jury that the defendant held these premises by the permission of the plaintiff, and on the terms that he should pay him for the occupation. I think there was no evidence that the defendant held by the permission of the plaintiff. It was not suggested that any express permission was given: but the plaintiff may be said to have permitted the defendant to hold, if he had the power of preventing it, and failed to exercise that power. Could the plaintiff have prevented the defendant from holding? To my mind it is plain that he could not. Knight, whose evidence is to be taken as true, says nothing occurred between him and the plaintiff to renew the tenancy; and the tenancy never was renewed until the payment of rent,—after the commencement of this action. The fallacy, both here and in the court below, as it strikes me, consists in disregarding the actual facts, and considering what facts the evidence might have proved. The letters show no contract, but a mere negotiation, which ended in nothing. What matters it what evidence we have of a fact, when we know what the actual fact is, and *that nothing was done between the parties, beyond what [*878
is shown in the letters addressed to the defendant? It is true the plaintiff after the commencement of the action pays rent, a fact from which under ordinary circumstances the continuance of a tenancy might be inferred. But, what room is there for any inference, when we are told as a fact that no tenancy did exist? Upon this evidence, it appears to me that there was no renewal of a tenancy between Knight and the plaintiff until the rent was paid. No doubt, as between the plaintiff and Knight, the payment and acceptance of rent would create an estoppel: but that would not bind the defendant. It seems to me that the position laid down by my Brother Willes at the trial, that there was no reversion in the plaintiff, is still made out. The plaintiff could not have prevented the continued occupation by the defendant. Further, assuming that the letters are evidence of a renewed holding by the plaintiff under Knight, the only result would be that the defendant held on upon the terms that he would pay Knight, if Knight would let him the premises; and that he would pay the plaintiff, if Knight relet the premises to him. The defendant in effect says,—"I will hold on until I know what you have done with the plaintiff, and then I will exercise my option of giving up possession." He never meant to be a trespasser. This inference is, I think, just as likely as the other: and there is no evidence to be submitted to a jury, if of two inferences which may be drawn from a given state of facts, the one is just as reasonable as the other.

I am at liberty to add that my Brother Martin, when he left the court, was very much of my opinion.

CHANNELL, B.—I also think that the judgment of the Court of Common Pleas ought to be reversed. I think *there was no evidence [*879
of a new tenancy between Knight and the plaintiff, and that the payment of rent after action brought was res inter alios acta, and ought not to bind the defendant in any way. Had the case rested upon the receipt of rent, there might have been some evidence for a jury of a new holding by the plaintiff of Knight. But that cannot be, if, as is

agreed, we are to take the statement of Knight to be true; for, if we take it as true, we cannot arrive at a conclusion contrary to it. It is clear that there was no permission in fact given by the plaintiff to the defendant to hold over. That, however, would not dispose of the matter, if the defendant had consented to continue to hold under the plaintiff. But neither the letters nor the other evidence in the case warrants us in saying that there was any such consent. On the contrary, from the letter of the 27th of March the fair inference would seem to be that there was a prospect of the negotiation for a renewed tenancy between the plaintiff and Knight going off, and that the defendant continued in possession in hopes of himself becoming tenant under Knight. Ibbs v. Richardson does not seem to me to bear much upon the question. The dictum of Lord Denman, that, when the tenant held over, there was a sufficient reversion to enable his immediate landlords to distrain if they pleased, does not seem to have been adopted by any of the other judges. If the plaintiff had distrained on the defendant, and after that Knight had sued the plaintiff, that case might have had some bearing on this.

Hill, J.—I think that the judgment of the Court of Common Pleas should be affirmed. The only question is whether there was any reasonable evidence which ought to have been submitted to a jury. If the *880] defendant held by the permission of the plaintiff, and on *the terms, either express or implied, that he was to pay the plaintiff for the occupation, he is liable to this action. It is said, that, as Knight's statement is to be taken as true, we are precluded from saying that there was any tenancy between him and the plaintiff. I cannot so read the case. Knight, indeed, says he still considered the plaintiff as his tenant after the 25th of March, 1858, on the ground that nothing had been done to put an end to the former holding. He said that after he had received the half-year's rent. That was a mere expression of opinion; but it was consistent with the fact and with the statements in the letters. Prior to the 25th of March there seems to have been some negotiation between Knight and the defendant, showing that the latter was desirous of continuing his occupation of the premises, whether as tenant to Knight or to the plaintiff did not appear: most likely the former. Then the letter of the 26th is very material, and contains a statement the effect of which, I think, ought to have gone to the jury. The fair inference to be drawn from it, as it seems to me, was, that there was to be a renewal of the tenancy between Knight and the plaintiff,—that, unless the key was given up before the next day, the plaintiff was to be considered as continuing tenant under Knight. Knight's letter of the 27th clearly shows that all negotiation between himself and the defendant was put an end to, and that the plaintiff's tenancy was to continue. The defendant remained in possession after that. The subsequent payment of rent by the plaintiff to Knight might reflect light upon the position of the parties. The case involves no great question of law. The only real question is, whether, upon the whole, there was reasonable evidence for a jury. I think there was.

Judgment affirmed, with costs.

*YEATMAN *v.* DEMPSEY. *June* 15. [*881

Judgment of the court below affirmed.

THIS was an appeal from the decision of the Court of Common Pleas in an action against the defendant for not attending as a witness in a cause in the Divorce Court: see the report, 7 C. B., N. S. 628 (E. C. L. R. vol. 97).

The declaration stated, that, in consideration that the plaintiff would retain and employ the defendant in his capacity of surgeon and apothecary to collect and prepare the medical and other evidence necessary and material to a suit which the plaintiff was about to institute in the Divorce Court, and to assist the plaintiff in the management of the suit, and to attend and give evidence at the trial of the issues to be joined therein, for fees and reward in that behalf, the defendant promised the plaintiff to use due diligence, skill, and attention in and about collecting and preparing the evidence for the said suit, *and to appear and tender himself as a witness, and to give his testimony at the trial of the said issues;* and the breach alleged was, that the defendant did not appear at the trial of the said issues, or tender himself to be a witness thereat, but refused and neglected so to do, by reason whereof the plaintiff was obliged to withdraw the record, and incurred costs, &c. The defendant pleaded non assumpsit.

To prove the contract alleged, evidence was given that the defendant had been engaged by the plaintiff to take care of and to watch his wife, with a view to the obtaining of proof of her insanity at the time of marriage,—upon the terms of his being paid from time to time his travelling and other expenses out of pocket, and for his fees and loss of time at or immediately after the trial; and several letters of the defendant's were put in, wherein he stated that there *was ample evidence [*882 to support the plaintiff's case, and advised him to go into court at once, and promised to attend the trial *on receiving a week's notice.* In consequence of the absence of the defendant when the cause was called on for hearing, the plaintiff was obliged to withdraw the record.

The jury having found that there was a contract by the defendant to attend at the trial without a subpœna and without receiving conduct-money,—the Court of Common Pleas held, that their finding was warranted by the evidence, and that the plaintiff was entitled to substantial damages, without showing that he would have succeeded in the Divorce Court with the aid of the defendant's evidence.

The case was argued at the sittings after Trinity Term, before Pollock, C. B., Wightman, J., Crompton, J., Bramwell, B., and Wilde, B., by *Pigott*, Serjt. (with whom was *Beresford*), for the appellant, and *Macaulay*, Q. C. (with whom was *Phear*), for the respondent.

POLLOCK, C. B., observed that the circumstances of the case were of a peculiar character, and not likely to form a precedent, and therefore it was enough to say that the court saw no reason to be dissatisfied with the decision of the court below.

The rest of the court concurring, Judgment affirmed.

ADDITIONAL CASES

FROM

CONTEMPORANEOUS REPORTS.

HARTWELL *v.* VESEY and Wife.(*a*) *Nov.* 2, 1860.

At the trial of an action for slander, the plaintiff's witnesses proved that the slanderous statements were untrue in fact, but also that they were the natural and reasonable inferences from what took place and they professed to describe; and that the defendant was present at the occurrence which the slanderous statements referred to. The judge ruled that the occasion was privileged; but that the plaintiff must have a verdict unless the defendant proved that the statements were made without malice:

Held, a right direction; the presence of the defendant being some evidence that the statements were made with a knowledge that they were untrue.

THIS was an action of slander; tried before the Lord Chief Justice at Bedford summer assizes: verdict for the plaintiff, damages 50*l.*

Keene now moved pursuant to leave reserved for a rule calling on the plaintiff to show cause why the verdict should not be set aside, and a new trial had on the ground of misdirection, and that the verdict was against the weight of the evidence. The declaration alleged as the slanderous words, "that the plaintiff kissed and embraced one Anna Maria Brewer." The evidence showed that the statement was false. The facts were as follow:—The defendant's wife having gone on 3d Jan. last to a school in which she took an interest, to see the superintendent Miss Stephens, surprised the plaintiff in the passage, as she believed, but as was disproved in fact, in the act of kissing and embracing a young lady named Brewer. The defendant's wife thereupon went to the clergyman and informed him that she had seen Miss Brewer and the plaintiff kissing and embracing in the passage; the clergyman communicated this information to the Duke of Bedford's steward, who in consequence dismissed the plaintiff from his situation, he having been forty years in the duke's service. The plaintiff and Miss Brewer swore that he never kissed her, and that what took place in the passage was a playful struggle by plaintiff to possess himself of a brush with which she had given him a push in the back. The learned judge ruled that it was a privileged communication, so that the sole question turned on express malice. There was misdirection in this, that the learned judge should have taken the case into his own hands, and not have put the question

(*a*) 3 L. T., N. S. 275.

of malice to the jury; or at all events he should have told the jury that if the defendant had said what was untrue, what she said must have been false within her own knowledge. There was a duty on defendant to do what she did. It is contended that if the position of the plaintiff and Miss Brewer in the passage was such as to lead to the reasonable belief that they were embracing and kissing, then there was no obligation on defendant to negative malice, for she spoke what she believed, and had reason to believe, was true. The statement must be untrue to her knowledge to make out malice; and there was no evidence showing that what she said was untrue to her knowledge; on the contrary, the inference from evidence was that she stated what she verily believed was true: Blagg *v.* Sturt, 16 L. J. 39, Q. B.

WILLIAMS, J.—I am clearly of opinion that there was no misdirection in this case. I assume that at the close of the plaintiff's case the evidence showed that this was a privileged communication; and therefore, if nothing more appeared, the defendant had a right to ask the judge to nonsuit. But the averment that the words were spoken maliciously is not disproved. I am of opinion that the judge would have done wrong to nonsuit, because there was some evidence for the jury of malice in fact, inasmuch as both the plaintiff himself and another witness proved that the statement that they were kissing and embracing was false. The question then is, was there any evidence that the defendant knew the words were false? The defendant was present at the transaction alluded to, and the plaintiff swore that what was imputed to him did not take place. The jury therefore were justified in concluding that the words were false, and false within the knowledge of the defendant. On the ground of misdirection the rule is refused; but a rule to show cause will be granted on the ground that the verdict was against the evidence.

The other judges concurred. Rule accordingly.

WEBBER and Another *v.* GRANVILLE.(*a*) *Nov.* 7, 1860.

By the deed securing an annuity which A. had granted to B., who resided abroad, power was given to A. to redeem the annuity upon paying a certain sum of money, and giving B. six months' notice in writing. C., who was B.'s general agent in this country, received the redemption-money from A., and delivered up to him the annuity deed without the notice required by the deed, and B., in fact, had no notice whatever that the money was about to be paid. C. had a general authority to invest and also to receive principal moneys as well as interest for B.:—Held, that C. had, therefore, authority to waive the stipulation as to notice, and to receive the redemption-money as he did for B.

THIS was an action by the executors of Elizabeth Amelia Croft, to recover the arrears of an annuity of 16*l.*, granted by the defendant on the lives of the testatrix, since deceased, and other persons who were still living. The defendant pleaded, inter alia, that in the lifetime of the testatrix he had paid her the sum of 208*l.* for the repurchase and extinguishment of the annuity, and that the testatrix had then redelivered to the defendant the annuity deed to be cancelled, and that the same was cancelled accordingly.

At the trial, before Keating, J., at the London Sittings, after Trinity

(*a*) 30 L. J., C. P. 92; 7 Jurist, N. S. 420.

Term last, it appeared that the testatrix, Mrs. Croft, had resided abroad for several years prior to her death, which happened in May, 1853, and that a Mr. Dufaur had acted as her solicitor and agent in this country, receiving her interest moneys and rents, and making remittances to her abroad, and also occasionally investing moneys for her upon various securities.

In May, 1847, Mr. Dufaur, on the part of Mrs. Croft, with her sanction, and out of some other moneys of hers which he then had in hand, advanced 200*l.* to the defendant upon the grant of the annuity for the arrears of which the action was brought. The annuity deed contained a proviso for the defendant's repurchase of the annuity at the sum of 208*l.*, upon his giving Mrs. Croft six calendar months' notice in writing, or, in lieu of such notice, paying to her one half-year's annuity, all arrears being previously discharged. The defendant paid the annuity from time to time to Mr. Dufaur, and on the 23d of December, 1851, he paid Mr. Dufaur 217*l.* 12*s.*, the amount of the redemption-money and arrears to that day, when the latter delivered up the annuity deed, and consented to receive the money without the notice required by the annuity deed. There was evidence of Mr. Dufaur having, upon a former occasion, received for Mrs. Croft the redemption-moneys of annuities granted by a Mr. Gray and a Mr. Eyton, and of having given credit for the same in the accounts rendered to Mrs. Croft. Mr. Dufaur, however, never accounted to her for the redemption-money he had received from the defendant, nor did he ever directly communicate to her the fact of his having so received it; but previously to his leaving this country, which he shortly afterwards did, in involved circumstances, he informed the plaintiff Webber (at that time acting as Mrs. Croft's solicitor) of his having so received the redemption-money from the defendant.

On the part of the plaintiffs, it was contended at the trial, that Dufaur had no authority to receive this money, and that the defendant knowing, as he must be presumed to have done, the terms of the annuity deed as to giving the six months' notice, knew, therefore, that Dufaur was not acting within the scope of his agency in receiving the money, and allowing the defendant to redeem the annuity as he did.

The learned Judge left it to the jury to say whether, looking at all the surrounding circumstances, Dufaur had authority dehors the deed to receive the money for Mrs. Croft. The jury found he had, and a verdict was accordingly returned for the defendant.

Lush now moved for a rule nisi to set aside such verdict, and for a new trial, on the ground that the learned Judge had misdirected the jury, and that there was no evidence to support their finding. It is submitted that Dufaur had no power to waive the condition as to notice, and that as the annuity was not redeemed according to the terms of the deed, he had no authority to receive the money on behalf of Mrs. Croft, even if he was as her agent empowered to receive investments.

Erle, C. J.—I think that there was evidence of authority to Dufaur to receive this money. There was strong evidence to show that he had a general authority to receive the capital money of the annuity, and if he had received it according to the terms of the annuity deed, there would have been abundant evidence to support the verdict. I think, however, that as such general agent, Dufaur had authority to waive

such stipulations in the deed as were in favour of the grantee of the annuity. That being so, the jury were warranted in finding that he had authority to receive the money, and the learned Judge only did his duty in directing them as he did.

WILLIAMS, J., concurred.

BYLES, J.—I think the question which was left to the jury was the true question, namely, whether the agent had authority to receive the money in the way he did. I think he had such authority to receive the principal money; and it seems to me that whenever any person, especially one who resides abroad, intrusts another with the general management of his property, it would be highly inconvenient if he did not invest such agent with a general authority to receive for him the moneys which are paid to the agent in the course of such management.

KEATING, J., concurred. No rule.

YEAMES and Others *v.* LINDSAY and Others. *Jan.* 23, 1861.(*a*)

The defendants having chartered a vessel to proceed to Taganrog, and there load a cargo at 60*s.* per ton, wrote the following letter to the plaintiffs:—"Enclosed please find three copies of charter, per William and Mary, from the Azof, and we shall feel obliged by your sending instructions to your firm at Taganrog to recharter for us, upon the best terms obtainable, and we hope you may be able to place her at advantage; but if, unfortunately, there should be any loss, your draft upon us for the difference will meet with due honour." At the time the vessel arrived at Taganrog, the rate of freight was 40*s.* per ton, and as the plaintiffs could not get more, they put their own cargo on board at that rate, drawing upon the defendants for the difference between that and 60*s.*, at which rate they would have to pay the owner in England when the vessel arrived. The vessel was eventually lost, and the defendants refused to accept the plaintiffs' bill, on the ground that, inasmuch as the ship never arrived at her destination, the plaintiffs were not liable for the freight, and as they had chartered her to themselves, and not to a third person, they had not paid away any money, and therefore they had sustained no such loss as was contemplated in the letter:

Held, that, as the moment the cargo was put on board there was a difference in the insurable value, as it then became liable to a freight of 60*s.* instead of 40*s.*, there was such a loss sustained as was in contemplation at the time of the contract.

THIS was a rule calling upon the plaintiffs to show cause why the verdict found for them should not be set aside and a nonsuit entered, pursuant to leave reserved, on the ground that there was no evidence to support the verdict.

The action, which was tried at Guildhall, at the last sittings, before Willes, J., was brought to recover 265*l.* 18*s.* 3*d.* for an alleged difference in freight at Taganrog, under the defendants' engagement, that if the plaintiffs sustained a loss through the difference in freight they the defendants would make it good.

The William and Mary was chartered by Edward Pembroke, one of the defendants, under a charter-party to proceed to Taganrog, and there load a cargo for Cork or Falmouth, for orders to discharge in the United Kingdom, or on the continent between Havre and Hamburg; the freight being at 60*s.* per ton for tallow, other goods in proportion, according to the Baltic rates, to be paid on delivery of the cargo.

On the 31st August, 1859, E. Pembroke, in the name of his firm, wrote the following letter to the plaintiffs in London:—

"Enclosed please find three copies of charter, per William and Mary,

(*a*) 3 L. T., N. S. 855.

from the Azof, and we shall feel obliged by your sending instructions to your firm at Taganrog to recharter for one Mr. Pembroke, the charterer, upon the best terms obtainable. . . . . She was built in 1855, and is of a very superior description, viz., twelve years A 1, so that we hope you may be able to place her to advantage; but if, unfortunately, there should be a loss, your draft upon us for the difference will meet with due honour."

The declaration, after having set out the terms of the charter-party, between the owner of the vessel and E. Pembroke, was as follows: "And the said vessel was sailing and proceeding on the said voyage, to wit, to Taganrog, under the said charter-party, and the plaintiffs were merchants carrying on business, to wit, at London and also at Taganrog aforesaid, and thereupon, in consideration that the plaintiffs at the request of the defendants would provide a cargo for the said voyage from Taganrog as aforesaid, for the best freight and upon the best terms obtainable at Taganrog aforesaid, such cargo when put on board being subject to the said charter-party (*i. e.* lien on it for non-payment of freight) and to the payment of the said agreed rate of freight therein mentioned, and to the said lien of the said owner or his agents, the defendants promised the plaintiffs that in case the said highest rate of freight obtainable at Taganrog aforesaid should be less than the said rates of freight according to the said charter-party, they the defendants would accept and honour the draft or bill of exchange of the plaintiffs upon the defendants for the difference between the said rates of freight, to wit, at the usual period in that behalf, and would pay the plaintiffs the said difference, and the plaintiffs say the said ship afterwards arrived at Taganrog aforesaid under the said charter-party, and that the highest rate of freight obtainable there at the time when the said ship so arrived there, and from thence until the providing by the plaintiffs of the cargo hereinafter mentioned, was much less than the said rates of freight so agreed upon as aforesaid between the defendants and the said L. Evans. And the plaintiffs further say that they did afterwards, relying upon the said agreement of the defendants, provide a cargo upon the best terms obtainable for the defendants, to be carried and conveyed from Taganrog aforesaid, and that the said cargo, when loaded on board the vessel, became liable to the said charter-party, and subject to the payment of the said agreed rates of freight therein mentioned, and to the said lien of the owner, master, or his agents.

"And the plaintiffs further say that the said rate of freight obtainable at Taganrog was much less than the said rates, according to the said charter-party, and that the difference of freight in respect of the said cargo amounted to a large sum, to wit, 268*l.* 18*s.* 3*d.*; and that all things have been done and happened, and all times elapsed necessary to entitle them to the performance by the defendants of their said promise, and that such draft or bill of exchange was drawn upon and presented to the defendants for the said sum as is in the said promise mentioned; yet the defendants did not nor would accept or honour such bill of exchange according to their said promise, although the same was duly presented to them for acceptance and payment, but wholly neglected and refused so to do, and to pay the said difference of freight, although the period for the maturity of the said bill of exchange had long elapsed before the commencement of this suit."

The second count stated that the plaintiffs had, at the request of the defendants, themselves shipped a cargo on board, and made such liable to lien and freight.

The defendants pleaded to the first count: 1. *Non assumpsit.* 2. Traverse of averment that defendants provided a cargo at the highest rate. 3. Traverse that a cargo was loaded liable to the charter-party. 4. Traverse of the bill being drawn and presented. 5. That the freight was payable only on delivery of the cargo, and the promise was subject to a condition that, if the ship was lost and no freight payable, the defendants were not to pay the said difference, and that the said ship was lost, and no freight ever became payable. 6. That the agreement was subject to a condition, that if there were no loss the defendants were not to pay, and that no loss did arise. The seventh, eighth, and ninth pleas to the second count were the same as first, second, and third; and tenth and eleventh to second count the same as fifth and sixth.

The vessel arrived in due course at Taganrog, and the plaintiffs, not being able to obtain for her a higher freight than 40*s.* per ton, themselves shipped a cargo at that rate, drawing upon the defendants for the difference between that rate and 60*s.*

Montagu Smith (*Cleasby* with him) showed cause.—The vessel is sent out to Taganrog to be rechartered, and the charterers make what they can out of it; but as soon as the cargo is put on board the original charterers are released from it, and the goods then become liable to a lien by the owner of the vessel for the freight and demurrage; the plaintiffs' charterer therefore at Taganrog became liable for this freight of 60*s.*, and as the market price was only 40*s.* he had a right to draw, according to the defendants' letter of the 31st August, upon them for the difference, which difference the plaintiffs would have had to pay to the owner if the ship had arrived safely in England; and I maintain that it makes no difference whether we put a cargo on board ourselves, or whether we chartered her to a third party, and no objection was made at the time to our having done so. What is meant by the word "loss" in the letter is, that if she should be rechartered at a less sum than 60*s.* then that the defendants would pay the difference. The acceptance of this bill was not liable to any condition; it was drawn by the plaintiffs and sent over here, and would no doubt have been accepted if the vessel had not been lost.

Watkin Williams (*Lush*, Q. C., with him).—This rule should be made absolute. This was a speculative charter on the part of the defendants, by which they were bound to put a cargo on board subject to a freight of 60*s.* per ton, and which, before it could be delivered to the consignees in this country, would be liable to a lien upon it for such freight and demurrage. If the plaintiffs had rechartered the ship when the rate of freight was at 40*s.*, and procured a merchant to put a cargo on board at 60*s.*, and then paid him the difference, we might have had some difficulty; but that event never took place, and the plaintiffs have sustained no loss. By the charter-party no freight was to be paid until the vessel arrived in London; which she never did. It never was intended that the plaintiffs were to have any interest in the speculation; and the true meaning of the letter was, that a loss of some kind was to be a condition precedent to our obligation to accept the bill; and as the plaintiffs have never parted with any money, nor sustained any loss, I

contend that they cannot recover, and therefore that this rule should be made absolute.

ERLE, C. J.—This was a rule to set aside the verdict for the plaintiffs, and enter it for the defendants, on the ground that there had been no loss to the plaintiffs within the meaning of the letter that is before me. I take the letter, and construe it with the course of business that is evidence in the case; and it appears that the defendants wrote out to the plaintiffs at Taganrog, informing them that a ship had been chartered by them at 60*s*., and requesting them (the plaintiffs) to get a freight there; and the part of the letter on which the judgment turns is: "We hope you will be able to place her to advantage; if unfortunately there should be a loss, your draft upon us for the difference will meet due honour." Now, what was the event that the defendants contemplated when they wrote that letter to the plaintiffs? The intention of Mr. Lindsay there was, that Messrs. Yeames should get a cargo at a higher freight than at 60*s*., which was what he contracted to pay to the shipowners under the charter; the advantage would then be to him, Mr. Lindsay, in having a profit from the chartered freight. Then comes the other alternative, "but if unfortunately there should be a loss;" what is the loss contemplated? I am of opinion that the loss which Mr. Lindsay contemplated was, if a cargo could not be got which would pay 60*s*. freight, but would pay less than 60*s*., then he should have to pay to the shipowners 60*s*. per ton for the freight of that cargo out, and the merchant who sent the cargo home would have to pay him less than 60*s*.; that is the loss which it appears to me he contemplated. Then he promises, "if there should be a loss, your draft upon us for the difference will meet due honour." Now it seems that the latter clause contemplated a loss. If the alternative of a loss should occur, it contemplated a loss that could be ascertained at the port of loading, when the cargo was on board; the difference was to be ascertained between the chartered freight and the lesser freight for which the cargo was to be carried, and then he promises, "your draft for that difference shall meet due honour." The usage on the evidence is for a ship to be sent out on a speculative charter, and taking the chance of the speculation of getting a cargo at a higher freight than that mentioned in the charter. If the speculation turns out to be a less freight, then one of the parties shall stand to that; and it is agreed between the plaintiffs and the defendants that if the plaintiffs should obtain a cargo of a third person, a merchant, and the current rate of freight was 40*s*., and that third person was to make his cargo liable for 60*s*., that according to the usual course of business, Mr. Lindsay, the defendant, should, under these circumstances, pay the merchant the difference, viz. 20*s*., which is the loss contemplated by Mr. Lindsay—the loss which the merchant would immediately sustain by making the cargo liable to 60*s*., because the freight is to be paid at the port of delivery, they paying him the loss which he would sustain by making his cargo liable to 60*s*. instead of 40*s*.; and if Messrs. Yeames had pursued the usual course of business, and got the intervention of a third person, and had paid him the 20*s*. for putting the cargo on board, and making him liable for 60*s*. instead of 40*s*., they might immediately have drawn a draft for the 1*l*. a ton which the defendant contemplated in the letter, and he most unquestionably must have accepted that draft. But the case for the defendants is, that the plaintiffs,

instead of getting a third merchant to intervene, put their own cargo of wheat on board. There is no pretence for saying the plaintiffs have acted at all wrong in taking this. But it is said, under those circumstances, there is no such loss as Mr. Lindsay contemplated. Supposing Messrs. Yeames had got a cargo from a third merchant, the defendants would have paid the difference without a word: whereas, the difference at the end of the matter belonged to Messrs. Yeames, and not to the third merchant. We do not dispose of the case on that mode of reasoning, but I am trying to see whether there is a loss, and a loss in respect of the contract agreed to, so that they could draw for the difference. I am of opinion there was a clear right in Messrs. Yeames to put their cargo on board a ship chartered at 60*s*., they making their wheat liable to 60*s*. a ton, instead of making it liable for 40*s*., which was the ruling rate of freight for which they could have got it delivered in the ship at that time. The cargo was diminished in value 20*s*. the moment it was put on board; the charterers' liability would cease the moment it was put on board; the moment it was put on board it is charged with 20*s*. a ton more than it need have been, and the diminution in value is a loss within the meaning of the contract. If Messrs. Yeames had gone with the shipping documents, it is clear they would have got 20*s*. a ton less on the cargo, being liable to 60*s*. instead of 40*s*. under the actual contract, and the actual loss they have sustained is, that they insured for the value *minus* the freight, after they deducted the actual freight charged upon the cargo which according to the usual course of business they insured, therefore at the value of the cargo *minus* 30*s*. a ton; and if they had not done that under the contract of Mr. Lindsay they would have insured it for the full value, *minus* 2*l*. a ton. The action is brought for the difference in the insurable value, and in the usual course of business it seems a loss is actually sustained. It is not necessary to go to that point, because the moment the cargo was put on board the value was diminished in the manner I have mentioned; and it is clear to my mind what the contract was. The loss was to be so looked after, and the difference so to be ascertained when the cargo was on board, in respect of which difference the defendant promised to accept the draft when drawn; and in refusing to accept he broke the contract, and so is liable.

WILLIAMS, J.—I am of the same opinion. It appears to me, upon the terms of the letter of the 31st August, 1859, that what the defendant contemplated was, that if there was a difference of freight he would accept, on it having been ascertained whether there was a loss or not, and if there was, the plaintiffs were forthwith to draw upon him for the amount of it. Now if it had so happened that a third party had become the charterer, he would have become so at the reduced rate. We have evidence of the course of business in the country which makes it plain what would have happened, namely, that the plaintiffs, acting on behalf of the defendant, would have paid the new charterer the difference between the new freight and the higher amount which he would be liable to pay because of the lien of the shipowner for the amount of the original charter, he having consented, in consideration of receiving the amount of the difference between the old and the new chartered freight, to be substituted for the original charterer at that price. Well then, the question remains, whether, in the event that has happened, namely, in

the event of no third party becoming the new charterer—the agents themselves becoming the charterers—there is such a loss as is contemplated by the letter? It seems to me that there is, because, if the agents of the plaintiffs had chartered a vessel at a lower rate, then they might have put their goods on board; those goods would only have been liable to the reduced freight; they would have been lessened in the value they would produce at the port of destination only by the reduced rate. But inasmuch as they are put on board subject to the lien for the old freight, then they became liable, because they had been turned into profit at the port of destination: they become liable to the advanced rate, and the cargo becomes deteriorated in value by the amount of the original higher rate. It seems to me, therefore, that is a loss which was contemplated by these parties—a loss which the plaintiffs would have sustained by reason of the current rates having become lower, for which, as soon as it was ascertained what was the condition of things, they had a right to draw upon the defendant according to the terms of the letter of the 31st August, and therefore the plaintiffs are entitled to maintain their verdict.

WILLES, J.—I am of the same opinion. I think some question may be entertained, upon reading the letter upon which the plaintiffs rely in the action, whether the loss mentioned in the letter does at all point to a loss to be sustained by the plaintiffs—whether it can be looked upon in any sense as being a contract of indemnity? I should rather have thought that at the time of the writing of the letter the defendant must have contemplated that either the plaintiffs or some other person might have shipped a cargo, and that when he used the word "loss" in the letter, he was not pointing to any loss sustained by the plaintiffs by paying persons to take the charter off the hands of the defendant, but that the use of the word "loss" is with reference to his own position in case it should turn out that the current rate of freight at Taganrog was less than the rate of freight in the charter. I should have thought it probable, if it were necessary to decide that, that the correct construction of the letter is, that in case it should turn out that in consequence of the current rate of freight being less than the chartered rate of freight the defendant's speculation would be a loss to him, then, in that event, as soon as the loss was ascertained by the plaintiffs procuring a cargo for the vessel, the amount of difference between the old and the chartered rate of freight would be to be drawn for by the plaintiffs upon the defendant; and I think that might well be sustained as being the probable and reasonable construction of the transaction, because the defendant was not on the spot at Taganrog. He had the vessel on speculation, and had himself no cargo ready to put on board of her; and if he had not acquired the plaintiffs' aid by writing to them this letter, the vessel would have been left without a cargo coming home to the shipowner, and the captain representing the shipowner would have been obliged to take a cargo at the current rate of freight, the best he could obtain, and then the shipowner would have sued the defendant for the difference between the one freight and the other as damages, and would unquestionably have recovered that amount against the defendant. There was further the uncertainty of the captain being able to obtain any cargo at all at the place, if the defendant failed to procure one for him; and in that case the defendant would have been exposed to dama-

ges for the entire amount of freight in the charter-party. Then, for the purpose of protecting themselves against that contingency, the plaintiffs, who had a house at Taganrog, and who had the opportunity to procure a cargo for them there, did what they have done. There is a third case I have not alluded to—that has not arisen because it did not appear from the letter the defendant contemplated it—there is a third freight arising above that in the charter, and the possibility of the defendant obtaining the benefit of a cargo to be procured, and for that purpose it was necessary for the defendant to employ the plaintiffs; then it provided for that particular case. The effect of the plaintiffs procuring a cargo under the letter is obvious—first of all, it entirely absolves the defendant from all liability on the charter-party into which he had entered. That is one consideration. First, an advantage gained by the defendant by the plaintiffs' act; then consideration the second was, the plaintiffs must either themselves put a cargo on board, and subject it to diminution in value, as has been explained by the Lord Chief Justice and my Brother Williams, or the plaintiffs must procure some third person to put a cargo on board under some disadvantage, and according to the ordinary course of things must pay that other person for doing so; in either case it must follow that if there be a loss to the defendant upon the transaction, that is, in respect of the freight being lower—if there be a loss to the defendant upon the transaction, it must be accompanied by some benefit procured for the defendant by the plaintiffs on their undertaking some disadvantage at his request. Then if that be so, what is the defendant to pay? The letter provides for that in express terms; it is, to pay the difference. I am not at all sure, if the case had arisen of the plaintiffs paying the freight by paying a lump sum of money less the difference between the old rate of freight and the chartered freight, there would be anything to prevent the plaintiffs recovering the difference between the freight from the defendant, except the rule that an agent shall give to his principal the benefit of any such transaction as I have been describing. That would be the only ground on which the plaintiffs' claim could be resisted, because the difference is the sum to be paid. I own I cannot help thinking, if the thing comes to be grammatically construed, that would be the true view of the case; assuming that, it is, "I will pay you any difference in case of loss sustained by you." I will not add anything to what has been said by my Lord and my Brother Williams on that: it is conclusive to show, even in that view of the case, the plaintiffs have sustained a loss represented by the difference. The only expression in the letter which at all raised a doubt in my mind at the trial was "recharter." The defendant expressed a wish to the plaintiffs, to recharter the vessel, and that has given rise to the ingenious argument addressed to the court, namely, that in case the current rate had been more than the chartered rate of freight, it must be taken that any payment made to Mr. Lindsay was a payment dependent on the voyage and the fact of the ship arriving in safety at the end of the voyage; and so it may be said by parity of reasoning, as there is a loss, it must depend on whether the ship arrives safely or not whether that is to be paid. If you take the word "recharter" with the other words, namely, "on the best terms that can be procured," you will see that "recharter" does not necessarily refer to the sum to be paid, being a sum in the nature of freight; and when you

turn to the course of business at Taganrog and find vessels sent out on speculation, there is an advantage or disadvantage to the vessel according as the current rate is more or less than the freight of the charter. It is then sold and the difference paid. Now suppose, without regard to further contingencies, you find "recharter" means nothing more than "dispose of the vessel for us, so that we shall not incur any liability further." That seems to be the case when the transaction is entered into. It appears to me, therefore, the plaintiffs are entitled to recover, and the rule must be discharged.

KEATING, J.—I am of the same opinion. For some time I confess I entertained a considerable doubt whether the loss, in the event that has happened, was in the contemplation of the parties at the time of writing this letter; but, on further consideration, I think that it may be reasonably brought within the terms used and the intention of the parties in making this contract. At first I was under the impression that the letter was confined exclusively to a transaction, as put by Mr. *Lush*, with third persons, for which a payment at Taganrog would take place, and the loss contemplated was a loss of that description on which the agent at Taganrog would be entitled to draw. But, looking at the words of the letter, and especially looking at the evidence at the trial, it seems to me that it still may very well have been in the contemplation of the parties on the 31st August when the letter was written, because there was nothing contrary to the agent's duty in doing what he did at Taganrog; there was no loss that accrued to Mr. Lindsay by his effecting such a purpose by himself shipping these goods, inasmuch as the defendant is to be taken to be aware of the course of business at Taganrog; and that being the course of business at Taganrog, a loss has accrued, which loss would be a loss ascertainable at Taganrog, because I entirely agree with my Lord and my Brother Williams that, if the loss accrued in putting the goods on board the vessel at Taganrog, it would come exactly within the terms as well as the object of the writing of this letter, and that, as the loss which has happened was a loss to the plaintiff, the defendant was bound to accept the bill; and, as he did not accept the bill, he is liable in this action. I agree with the rest of the court that the plaintiffs should retain their verdict.

Rule discharged.

HALLER v. WORMAN.(a) *Jan.* 24.

Where a party appears by counsel before the court or a judge at Chambers in any stage of the cause, and counsel makes an admission of a fact, though unsupported by affidavit, the court will regard such statement as presumably true, and will admit it in evidence when offered by the other side.

In an action of detinue to recover possession of certain papers, the defendant took out a summons before a judge at Chambers to change the venue, and appeared by counsel to support the application. In the course of the proceedings before the judge, counsel admitted that his client had the papers:

Held, that this admission was rightly received in evidence at the trial of the cause, as a statement made by counsel in discharge of his functions as counsel, relevant to the matter at issue, and made for the purpose of influencing the judge to take a step in favour of his client:

(a) 3 L. T., N. S. 741.

Per Williams, J.: When counsel makes before the court or a judge a statement, or does an act in the presence of the attorney on the record, or any authorized person who represents him, and the statement or the act is not repudiated by the attorney or his representative, that amounts to an assent to or adoption of it, and it becomes the statement or act of the attorney.

THIS was an action of detinue, brought to recover possession of certain papers in a suit in chancery to which plaintiff was a party. The defendant pleaded—1st, non detinet; 2dly, that the papers were not the plaintiff's, as alleged. Issue having been joined, defendant took out a summons at chambers before Willes, J., to change the venue from Bristol to Middlesex, and appeared by counsel (Mr. *Barry*) to support the application. The cause was tried before Keating, J., at Bristol Summer Assizes. In his evidence at the trial Mr. *King*, plaintiff's attorney, swore that on the 7th August he attended a summons at judges' chambers to change the venue, at which the defendant was represented by Mr. *Barry*, as counsel, who admitted "that his client had the papers." The learned judge received this evidence, and a verdict was thereupon found for the plaintiff, value 500*l*., leave being reserved to reduce the amount to 1*s*. if the papers should be given up.

H. T. Cole having, on a former day, obtained a rule calling on plaintiff to show cause why the verdict should not be set aside, and a new trial had, on the ground of misreception of evidence in this, that the judge had admitted evidence of a statement made by Mr. *Barry* on the hearing of a summons before Willes, J., and on the ground of misdirection by the judge in directing the jury to act on such statement,

M. Smith (*Prideaux* with him) now showed cause.—It is submitted that if a party himself makes, or by his attorney or agent makes, in the proceedings in a cause any statement material to the inquiry, he is bound by it. If theeparty himself makes it, then, as is admitted, he will be bound by it, and the question therefore is, whether the statement made by his attorney or agent is not equally binding. There was evidence that defendant was in possession of the deeds, and claimed a lien upon them. The statement made for defendant was relevant to the inquiry before the judge, and may therefore be used against her. All the cases are collected in Roscoe on Evidence 60, 9th edit. The present case is altogether clear of the principle laid down in Swinfen *v.* Swinfen, and entirely confined to the question whether the statement made by *Barry* came legitimately within the scope of the subject then before the judge. If the court will be bound by what appears on the learned judge's note, it will be found that Mr. *Barry's* statement was made with the view to influence the judge, and directly for the purpose for which both parties went before him. For these reasons this rule should be discharged. [KEATING, J.—Upon my note at the trial it appears that counsel and attorney appeared at chambers.] There is abundant evidence to support the verdict without the statement by Mr. *Barry*, though it is on the ground that that statement was relevant and properly admitted in evidence we rely.

Hawkins (*H. T. Cole* with him), in support of the rule.—The defendant ought not to be bound by the statement made by Mr. *Barry* when before the judge at chambers. The only instructions Mr. *Barry* received were to appear at chambers and support an application to change the venue; he was entirely unauthorized to make any such admission as it appears he did. The defendant's attorney was not present with coun-

sel, only his clerk. There is no case in the books which comes near the present: Stracy *v.* Blake, 1 M. & W. 168,† Doe *v.* Roe, 1 E. & B. 279 (E. C. L. R. vol. 72). [WILLIAMS, J.—The strongest case against you is Van Wart *v.* Wolley, R. & M. 4, which you will also find in Roscoe.] Parkins *v.* Hawkshaw, 2 Stark. 239 (E. C. L. R. vol. 3), Duncombe *v.* Daniell, 8 Car. & P. 222 (E. C. L. R. vol. 34). It has even been held that an admission made in the course of conversation between two attorneys respecting the cause, but not with a view to dispense with proof, cannot be given in evidence: Petch *v.* Lyon, 9 Q. B. 147 (E. C. L. R. vol. 58), Young *v.* Wright, 1 Campb. 139. It was in this last case held that the admissions of the attorney in a cause are evidence against his client only when they are made with a view to obviate the necessity of proving the facts admitted at the trial: Mitchell *v.* Ellis, 1 Car. & Kir. 684 (E. C. L. R. vol. 47); Richardson *v.* Peto, 7 M. & G. 896 (E. C. L. R. vol. 49); College *v.* Horn, 3 Bing. 119 (E. C. L. R. vol. 11). The defendant has not made an admission herself, nor by her attorney on the record, nor has she sanctioned or adopted the statement made by Mr. *Barry*. [ERLE, C. J.—Where an attorney sends his clerk to represent him, he must be taken to stand in the place of the attorney himself.] There was no proof of authority to make the statement, and that being so, it cannot reasonably be contended that what fell casually from Mr. *Barry* is to be taken as evidence of an admission of a fact: Taylor on Evidence, ss. 700, 709.

ERLE, C. J.—I am of opinion that, notwithstanding the authorities, and the argument of Mr. *Hawkins*, this rule ought to be discharged. I think the evidence was admissible. I distinguish the case entirely from that class of cases where the admissions by a legal adviser, made for the purpose of saving proof and expense, are held to be admissible; it is not at all in that class as being a statement made by the legal adviser of a party in the course of a cause, whether made during the trial, at one step in the cause, or whether made on a summons for postponing the trial another step in the cause; but it is a statement by the legal adviser representing the party in the course of the cause for the purpose of obtaining the judgment of the court which is to decide upon the application, and it is a statement of a cardinal fact upon which the judgment is to turn if the judgment is in favour of the party; and so I think it is presumably true, as what the legal adviser says, whether he be a barrister, or whether he be a pleader, or whether he be an attorney, the statement of a fact by the legal adviser of the party who comes forward before an authorized tribunal, with the intention that that authorized tribunal should consider the statement so made to be a true statement of fact for the advantage of the party at the time when it is made against the other party, that same statement ought to be taken as a true statement of fact when the other wishes to use the fact as a fact. The defendant wanted the trial postponed for the purpose of adding a plea, and getting other witnesses to come forward; the defendant represented to the judge, for that purpose, that she had the papers, they were in court, and wanted to add a plea justifying her possession of those papers, because she had a lien upon them. If when the parties were before Willes, J., at chambers, for the purpose of postponing the trial, it was a true statement of fact that she had the papers in her possession, it seems to me that the fact that she had the papers in her

possession ought to be taken against her to be true when the same matter is to be inquired into before Keating, J., at the trial. It is quite impossible that it can be a fact for the purpose of Willes, J., giving judgment in favour of the defendant, and not so for the purpose of the defendant seeking judgment for the plaintiff. I think the language of Lord Denman in the case of Duncombe *v.* Daniel is the language I should wish to adopt in this case, that a counsel or pleader representing the party in a cause, and making an assertion of a fact for the purpose of having it believed, and to have the judgment of the court in one stage of the cause, that statement ought to be presumed to be true. If the defendant had made an affidavit of this fact for the purpose of getting the trial postponed, nobody can doubt that it would be admissible; if the attorney of the defendant had done so, and used it on the summons, no doubt it would be admissible; and to my mind a statement made at the table of a judge at chambers as a statement of fact made without affidavit, ought to be taken, in practice, to be as much binding on the party as if made on affidavit for the purpose of saving expense and saving delay, and on the faith of counsel and attorney. If they feel there is the obligation of truth, and speak with reference to that obligation, judges have been in the habit of permitting statements to be made and relying upon them without affidavits, unless they see a party has a hostile view, then they do not trust him, but make him swear to it. If that is required, it is always done. I consider, if the parties stand before the court and make statements relative to the matters to be decided on, those statements by each of the parties you may thoroughly act upon, without the sanction of an oath. This statement appears to come precisely within that description of cases on summons as made by the legal adviser of the defendant, barrister or attorney, whether a clerk or the attorney himself; for an attorney is quite entitled, if he chooses, to send a clerk to represent him and to give instructions, and it is to be presumed that the party is speaking on instructions. I think, therefore, after looking at all those cases, none appear to conflict. There is nothing like an authority that goes against them; this and many of the cases are, it seems to me, analogous, and justify our judgment. I am of opinion that it was an admissible statement, and therefore the rule ought to be discharged.

WILLIAMS, J.—I am also of opinion, under the circumstances, that the statement of counsel at judges' chambers was perfectly admissible in evidence. It was a statement that was made by the counsel in the discharge of his functions as counsel—a statement that was relevant to that duty, and it was made for the purpose of influencing the judge to take a step in favour of the counsel's client. But besides that, it was to my mind not only a statement of counsel, but also a statement of the attorney in the cause, because the attorney brings the business into the chambers, and I think, as far as the conduct of that business goes, it is a statement of the attorney. I think it is important that that should be fully understood; if a statement is to be made by counsel, or an act done by counsel in the presence of and with the knowledge of the attorney, that is a statement or an act which, if the attorney does not disapprove of, or does not repudiate it as his act, it is his duty to be present and to direct counsel privately or publicly, or somehow; but if he does not dissent, but sits quite silent in court, I think it amounts to an

assent to or adoption of the act or statement, and it becomes his own act or statement. It seems to me, in the present case, the statement was made for the purpose of influencing the judge by counsel and attorney in the cause; the question is, whether that is admissible or not? I see no evidence as to what weight ought to be attached to it, but I say it is impossible to exclude it from the evidence in the cause. I see no ground why it should not be considered as primâ facie a statement that was authorized by the client, and so is evidence against the party on whose behalf it was made.

KEATING, J.—I also think this evidence was admissible, and admissible upon the ground on which it was tendered, namely, as being a statement of counsel in the presence of the attorney, a statement of fact made on the part of the defendant, who was applying to the judge to take a step in the cause; and in order to induce the judge to take that step, a statement made of the facts which were to be admitted in evidence, those facts being relevant to the application so made by the defendant. We do not at all interfere with the class of cases alluded to by Mr. *Hawkins*, in which it has been held that casual conversations by attorneys, or casual statements by counsel, are not to bind clients. But my decision proceeds upon the ground, as stated by my Lord and my Brother Williams, of this being a step taken in the cause by the defendant herself, and for the purpose of that step—relevant statements being made inducing the judge to act, those statements being made by the counsel in the presence of the attorney. I therefore think the evidence could not have been excluded.

Rule discharged with costs. (The Court refused leave to appeal.)

OXLADE v. THE NORTH EASTERN RAILWAY COMPANY.(a)

Jan. 26.

The fact of a list of tolls being stuck up at all the stations, according to the Act, is not evidence that they are bound as common carriers to carry goods in bulk from every such station.

THIS was a demurrer to a declaration, and also a rule to enter the verdict for the defendants.

The action was tried at York, before Martin B., when the jury found a verdict for the plaintiff, with 1*s.* damages.

The real question in issue was, whether there was evidence to go to the jury that the defendants held themselves out as common carriers of coal in bulk from the Shincliffe station, the plaintiff complaining that the defendants had refused to carry his coal from that station, and contending that they were bound as common carriers to do so, and that a list of tolls being stuck up at the Shincliffe station was evidence of such duty.

Oxlade showed cause in person.

Mellish, in support of the rule, was not called on.

ERLE, C. J.—In this case the question is, as to whether the plaintiff has given sufficient evidence to show that the defendants were common

(a) 3 L. T., N. S. 671.

carriers from the Shincliffe station. The company have put up at that station a list of their tolls for the carriage of goods; but is that evidence of their being obliged to carry them from it? They say that they have not accommodation at that station to enable them to carry on a coal traffic; and, although they may have carried samples of coal from it, that is no evidence of their having held themselves out as common carriers of them in bulk from it. The company have a right to fix the time at which they will run from any particular station, and also what goods they will carry from it; for instance, they may say, "We will carry cattle from one station and not another, and minerals in the same way." Their Act says that a list of tolls must be put up at every station, but I do not see that that is a proof of their being bound to carry goods from every one of them. I am therefore of opinion that Mr. *Oxlade* has misconstrued his right, and I do not think that any duty is imposed upon the company to carry coals from the Shincliffe station, and therefore the verdict must be set aside.

WILLIAMS, J.—I am of the same opinion. The only evidence as to the defendants being common carriers is the list of tolls which it is the duty of the company to put up at each station, and it has been argued that because this list is so put, that, therefore, the company have held themselves out as common carriers from every such station. Looking at the surrounding facts, it would be contrary to common sense that it should be so; they are obliged to put up the lists, but they have a right to fix upon the stations from which they will carry certain goods.

KEATING, J., concurred. Rule absolute.

As to the demurrer, the declaration is to be amended, and each party pay his own costs.

TURNER *v.* HUTCHINSON.(*a*) *Feb.* 8 and 9.

Letters written by a deceased agent to his principal subsequently to the date of an agreement alleged to have been made by him on behalf of the principal, detailing conversations with the other party, are not admissible on behalf of the principal to prove that no such agreement was entered into, or that the agent was not authorized to make it, and that the principal never knew of nor ratified it.

Although the alleged agreement was verbal only, and the agent afterwards, and after the writing of the letters, signed a written agreement confirming the verbal one, the letters are inadmissible to prove that the agent was not authorized to sign the written agreement.

It makes no difference that the agent is dead, unless the letters were written at the time of the conversations detailed, and it was the agent's duty to communicate them to his principal at that time.

THIS was an action brought by the former tenant of a farm belonging to the defendant, for compensation for repairs and improvements. The declaration contained two special counts and a count for money payable for work and materials, and moneys expended, &c. The first count was on an agreement alleged to have been made at the commencement of the tenancy, whereby the plaintiff was to become tenant from year to year on the terms that he should not be bound to repair the premises (they being then in bad repair), but that, if he should do so, or make any improvements, and should receive notice to quit from his landlord,

(*a*) 3 L. T., N. S. 815.

he should receive compensation for the same; and that, if plaintiff should himself give notice to quit, he should not be entitled to compensation. The second count was on an agreement, dated 24th May 1859, made by Philip Shaw, defendant's agent, reciting and confirming the former agreement, and stating that plaintiff had expended moneys in repairs and improvements, and had received notice to quit, and stipulating that the amount should be valued, and he should not be required to give up possession until he should be paid therefor.

The plaintiff claimed about 200*l.* for the value of repairs and improvements effected.

It appeared at the trial, which took place before Blackburn, J., at the last summer assizes for Lewes, that the farm in question was situate in Sussex, the defendant being a gentleman of landed property in Yorkshire. The plaintiff was let into possession about Michaelmas 1850, by one Philip Shaw, since deceased, who lived in Sussex and acted as a kind of bailiff for defendant and his family; and it was deposed by plaintiff that, at the time of his being let into possession, a verbal agreement was made between Shaw and himself to the effect alleged in the first count. In support of plaintiff's case a written agreement to the same effect was produced, which was dated Sept. 1850 and signed by Shaw, but which, it was admitted, was not actually drawn up until the spring of 1859, and was then prepared in anticipation of Shaw's death, he having been seriously ill. A further agreement signed by Shaw, to the effect of the one set forth in the second count, was also produced. Evidence was given of Shaw's having received the rents from plaintiff, and that he was the only person known in the neighbourhood as representing defendant.

On the part of the defendant it was shown that the defendant's actual recognised agent was one Benson, also deceased, his land steward, who had resided in Yorkshire and had the management of defendant's property there, and to whom Shaw had been in the habit of remitting the rent of the farm in question; and it was contended that no such agreement as that alleged had been made by Shaw with plaintiff, and that even if made, in point of fact Shaw had no authority to make it; and that Shaw had never informed either defendant or Benson or Benson's successor (Monkhouse) of his having done so. Witnesses were called in support of defendant's case; and a series of letters written by Shaw to Benson, commencing about the time of plaintiff's being let into possession and ending in 1858, were read by defendant's counsel, the contents of which were inconsistent with the alleged agreement. It was proposed to put the letters in evidence. Plaintiff's counsel objected to their admissibility, upon which defendant's counsel said he would only put in those which had been written about the time of the letting into possession. One of the jury then interposed, observing that it was not right to read letters which were not to be put in as evidence, whereupon defendant's counsel put in the whole. The jury returned a verdict for the defendant.

One of the letters objected to was as follows:—

(Shaw to Benson.)

"Ardingley, 22d Dec. 1855.

"Sir,—On the 20th I paid into the East Grinstead Bank, to be

forwarded to Mr. Hutchinson's bankers, Darlington, the balance of the half-year's rent to Michaelmas last for Philpotts farm, as under:—

Rent to 29th Sept. 1855			£42	10 0
Deduct for property-tax . . .	2	16 8		
Bankers' charge	0	2 0	2	18 8
			£39	11 4

and beg to inform you that Mr. Turner would have paid it two months before, but I have been unable to attend to any business through illness, but am now, thank God, partially recovered. I also further beg to say that he has engaged to put the house in watertight repair in consideration of the low rent; he also thinks he has done considerable more than the tenant's duty by way of repairs to the barn, which cost him about 10*l.* more than it should have done; also the road from the farm to the village has cost him considerable, which he has now made good, and is a great improvement to the estate, and would certainly be worth more money if offered for sale.—I am, Sir, yours truly,

"PHILIP SHAW.

"To Mr. G. Benson, Eggleston."

In Michaelmas Term last *Garth* obtained a rule *nisi* for a new trial, on the ground that the letters of Shaw were not admissible in evidence.

Lush, Q. C., and *Lucius Kelly* now showed cause against the rule.—They contended that the earlier letters, if not the whole, were clearly admissible as part of the *res gestæ*. The questions were whether Shaw ever made the agreement, and whether defendant authorized him to do so. [WILLES, J.—I have repeatedly heard Lord Wensleydale say, the objection to hearsay evidence does not apply to proof of an act done or of a direction to do a thing; you can't prove it in any other way.]

WILLES, J., after looking over the letters, observed the contents of some of them appeared quite irrelevant. The verdict would not be liable to be disturbed by the admission of irrelevant evidence. But if any one letter were put in, the contents of which were relevant and which was not legally admissible, there must be a new trial. Take the letter of 22d December, 1855 (above set forth); argue the case upon that.

It was then contended that the letter of 22d Dec. 1855, as well as the others, was admissible to prove that Shaw had never informed his principal of his having made the alleged agreement, and to show that he had only a limited authority which he had exceeded by making the agreement, if he made it at all; and also, as proving that his authority to make any such agreement, if it ever existed, had ceased at the time when the written agreements were drawn up in 1859, at which date the property had been sold and plaintiff was under notice to quit. Secondly, it was argued that the letters were written by a deceased agent in the course of his duty, and were admissible on the principle established in Price *v.* Lord Torrington, 1 Salk. 285; S. C. 1 Smith's Lead. Cas. 235; and Poole *v.* Dicas, 1 Scott 600; and Marks *v.* Lahee, 4 Scott 153 (the judgment of Park, J.), were also referred to. [WILLIAMS, J.—Do you contend that if the statement was made by word of mouth only, it would

be admissible in evidence against plaintiff?] There is authority to that effect, though the question does not arise here: 1 Smith's Lead. Cas. 240, 4th edit. Then, as to the particular letter of Dec. 1855, it was urged that, as the letter admitted the receipt of rent for plaintiff, it was admissible under the rule in Higham *v.* Ridgway, 1 East 109; 2 Smith's Lead. Cas. 249. [WILLES, J.—That matter is wholly unconnected with the part of the letter which you sought to use.](*a*)

Hawkins, Q. C., and *Garth*, in support of the rule, were not called upon.

WILLIAMS, J.—We are all of opinion that these letters were not properly received in evidence; consequently this rule must be absolute for a new trial. It has been argued that they are admissible in evidence, because they suggested the extent of the authority which Shaw had from his employers, or defined themselves the limits of the authority conferred upon the agent; but if any one of the letters is inadmissible, there must be a new trial. My brother Willes has properly selected one letter out of the number as a test, and that is the letter of Shaw to Benson, dated 22d Dec. 1855. That appears to be a letter from Shaw to Benson in the capacity of his employer. It is a mere statement of certain terms on which the tenancy of Turner, the plaintiff, subsisted. The question is, whether the statements in that letter support or are supported by the proofs, and are admissible. It should be observed that this is not a letter expressing or showing the limits of Shaw's agency, nor is it a letter provoking an answer which may define them. It appears to me a letter that does not fall within the rule in the class of cases dealing with statements or declarations by deceased persons made in the course of their duty, contemporaneously with the fact, as admissible in evidence. It is of the essence of such admissions that it is the duty of the person to make contemporaneous entries of what took place, or, at all events, entries immediately afterwards. Some difficulty has arisen in the course of this argument whether or not it is the duty of the person making the statement or declaration to make a written entry of it; but there are authorities to show that it is not absolutely necessary that the entry should be in writing. If it were requisite to decide on that point in the present case, the court would take time to consider it. But it is unnecessary, for we decide on the point of the letter not being a contemporaneous statement made by Shaw. It is a fatal defect that the letter was not written contemporaneously with the alleged agreement, nor in pursuance of Shaw's duty to make the statements which it contains. With respect to the case of Higham *v.* Ridgway, the decision there has in reality nothing to do with the present case. This rule will therefore, on these grounds, be absolute for a new trial.

WILLES, J.—I am of the same opinion. I think the letter of the 22d Dec. 1855 was not admissible upon either of the grounds urged on behalf of the defendant. It was not admissible for the purpose of showing the constitution of Shaw's authority, or the extent of it. It was not admissible as a declaration made by Shaw in the course of his business; nor is it admissible as having been made in the course of his duty contemporaneous with the agreement; nor is it admissible as an entry made by Shaw against his own interest. It stands simply as a statement

(*a*) See Taylor on Evid., 2d edit., sect. 613.

voluntarily made by an agent five years after the transaction took place, showing that the letting of the farm was not on the terms asserted by the tenant, but on those insisted upon by the landlord. The letter is in reality a statement made by a third person, not the agent of the tenant, and was improperly received in evidence; then the verdict cannot stand, and there must be a new trial.

KEATING, J.—I am also of opinion that the rule must be absolute. I say this with regret, because the verdict is, I think, consonant with the justice of the case. Still, the objection made to the admissibility of the letter is fatal. There is nothing to show that it was the duty of Shaw to make a contemporaneous entry of the terms of the agreement.

ERLE, C. J., was sitting at Nisi Prius. Rule absolute.

WHITEHOUSE *v.* FELLOWES and Others.(*a*) *Feb.* 11 and 12.

The defendants were the trustees of a turnpike road, and the plaintiff alleged that they so negligently made and maintained certain catchpits for carrying off the water from the road, that large quantities of water ran into his land and collieries, whereby he was greatly damaged. The plaintiff first complained in July, 1859, and the defendants made some alterations; he was again damaged, and complained in December of the same year, and eventually brought this action. On behalf of the defendants it was contended that the action was not brought in time, inasmuch as it was not brought within three months after the act complained of was committed, as enacted by sect. 147 of the Turnpike Road Act, 3 Geo. 4, c. 126:

Held, that the action was in time, as no cause of action arose to the plaintiff so long as the works of the defendants caused him no damage, and that the cause of action first accrued when the plaintiff received actual damage.

It was also contended that, according to the case of Sutton *v.* Clarke, the defendants being trustees were not liable, and that the learned judge did not leave the question properly to the jury to say whether the defendants had been guilty of negligence:

Held, that the learned judge was right in asking the jury whether they considered the defendants had been guilty of negligence, and that they having found in the affirmative, that then the defendants were liable for such negligence.

THIS was an action brought against the defendant as clerk to the trustees of the Sedgeley roads, and the declaration, after reciting the title of the Act of Parliament under which the trustees acted, stated, that the said trustees so negligently, carelessly, wrongfully, and improperly conducted themselves in and about improving, maintaining, and keeping in repair a certain turnpike road leading from Cann-lane to the town of Bilston, in the county of Stafford, to wit, by making manifestly insufficient catchpits for carrying off the water accumulating and running in and along the said road, and by improperly cutting divers outlets from the said roads into the adjoining land, that by means of such negligent, careless, wrongful and improper conduct large quantities of water ran from such road into the land and collieries of the plaintiff, whereby the said land and collieries have been damaged, and the plaintiff has been prevented from working the said collieries and lost large gains, &c.

Plea, not guilty by statute 3 Geo. 4, c. 126, s. 147.

This action was brought to recover damages for alleged negligence on the part of the trustees of the road for not providing catchpits suffi-

(*a*) 4 L. T., N. S. 177.

ciently large for carrying off the water from the road, and in making outlets from the road, by reason of which the plaintiff's land and colliery became flooded. The first complaint made by the plaintiff to the trustees was in July, 1859, and the surveyor by their direction made some alterations to remedy the evil complained of. On the 6th of December, 1859, the plaintiff again made a complaint by letter to the surveyor, and stated that legal proceedings would be commenced, unless measures were taken to the satisfaction of his agent to prevent the escape of water. Three other letters were sent by the plaintiff to the surveyor respectively dated the 12th, 19th, and 23d December, after which the writ was issued.

The cause was tried at Stafford before Byles, J., when a verdict was found for the plaintiff, leave being reserved to move to enter a nonsuit on three grounds—first, that the action was not brought within three months after the act complained of was committed, as enacted by sect. 147 of the Turnpike Road Act, 3 Geo. 4, c. 126; secondly, that the learned judge did not leave the question properly to the jury to say whether the defendants had been guilty of negligence; and thirdly, that the verdict was against the weight of evidence.

A rule having been obtained on a former day,

Gray (*Holl* with him) now showed cause.—The damage done in this case is owing to the defendants allowing the catchpits to remain in this state. The continuance is the cause of action, and therefore the continuance is the thing done, and therefore the action is brought in time. It would be absurd to say that the plaintiff should be precluded from his remedy because he did not bring an action within three months of the commencement of the injury, when the damage done was very slight, and when there were grounds for supposing that the trustees would of their own accord rectify the evil. This case differs from that of Bonomi *v.* Backhouse, Ell. & Bl. 622, for there the damage flowed from a single act. Here is an act of omission, and as soon as any damage occurs from such omission then the cause of action arises: Roberts *v.* Read, 16 E. 215; Gillon *v.* Boddington, Ry. & Mood. 161 (E. C. L. R. vol. 21); Howell *v.* Young, 5 B. & C. 259 (E. C. L. R. vol. 11); then the case of Nicklin *v.* Williams, 10 Exch. 259,† was one entire act of commission. [WILLIAMS, J., referred to Holmes *v.* Wilson, 10 Ad. & El. 503 (E. C. L. R. vol. 37); Hudson *v.* Nicholson, 5 M. & W. 437;† Thompson *v.* Gibson, 7 M. & W. 456;† Battishill *v.* Reed, 18 C. B. 696 (E. C. L. R. vol. 86); Oakley *v.* Kensington Canal Company, 5 B. & A. 138 (E. C. L. R. vol. 27).] Then there is no distinction between a private person and a public body of commissioners; and the latter are liable to an action against them for negligence, and they can reimburse themselves out of the rates: The Southampton and Itchin Bridge Company *v.* Local Board of Southampton, 98 L. J. 41, Q. B.; Ruck *v.* Williams, 3 H. & N. 308.† [WILLIAMS, J.—The case of Boulton *v.* Crowther, 2 B. & C. 703 (E. C. L. R. vol. 9), is the leading case on the point, where it was decided that trustees are not liable to an action for consequential injury arising from an act which they are authorized to do, unless they have acted arbitrarily, carelessly, or oppressively.] The trustees in doing this work were bound to use proper care: The Grocers' Company *v.* Donne, 3 Bing. N. C. 34 (E. C. L. R. vol. 32); Violet *v.* Simpson, 27 L. J. 139, Q. B.; Jones *v.* Bird, 5 B. & Ald. 844 (E. C.

L. R. vol. 7); Lloyd *v.* Wigdale, 6 Bing. 489 (E. C. L. R. vol. 19); Tindal *v.* King, 17 C. B. 483 (E. C. L. R. vol. 84); Ward *v.* Lee, 7 El. & Bl. 426 (E. C. L. R. vol. 90), were also cited.

Pigott, Serjt. (*Phipson* with him), contended that, according to the case of Sutton *v.* Clarke, 6 Taunt. 29, the trustees are not liable. [WILLIAMS, J.—In Sutton *v.* Clarke, it was the duty of the trustees to do a particular act, but in the present case they were to keep the roads in repair.] We have not turned the water out of its natural course; all we have done is, instead of open drains we have made covered ones, and this is just as much our duty as it is to mend the roads, and it does not follow that because what we did has produced the effects complained of by the plaintiff, that therefore we have been guilty of negligence: Harris *v.* Baker, 4 M. & W. 27;† Gibbs *v.* Trustees of the Liverpool Dock Company, 3 H. & N. 257.† Then I say that the action is too late; and that it ought to have been brought as soon as the cause of action arose. (He referred to and reviewed the cases already cited.)

WILLIAMS, J.—This rule has been obtained upon three grounds—two based upon points of law, and the other on the ground that the verdict was against the weight of evidence. Now the points of law are, first, whether the declaration is answered by the plea relying upon sect. 147 of the Turnpike Act, 3 Geo. 4, c. 126, which says that "if any action shall be commenced against any person or persons for anything done in pursuance of this act, then and in every such case, such action or suit shall be commenced or prosecuted within three months after the fact committed, and not afterwards;" and, secondly, on the ground that the learned judge was wrong in not leaving the question to the jury to say directly whether the defendants had been guilty of that description of culpable negligence which would make them liable in this action. I think it would be more convenient if I address myself to the second ground first. Now there is a great difference between the acts of trustees and those of private individuals, and a great many cases have been referred to upon this point, but several of them do not appear to me to have any application at all to the subject in hand. The case which has been most relied on is that of Sutton *v.* Clarke, but that only bears upon the cases where the trustees were authorized by Act of Parliament to do some special act, as in the case of The Governor and Company of the British Castplate Manufacturers *v.* Meredith, 4 T. R. 794, where it was held, that where the acts of commissioners appointed by a Paving Act occasioned a damage to an individual without any excess of jurisdiction on their part, the commissioners, or paviors acting under them, were not liable; and in Sutton *v.* Clarke, and the cases similar to it, that doctrine seems to have been recognised, that where persons are authorized to do some particular act, and by doing such act they prejudice the rights or injure the property of some private individual, they are not liable for doing that act, notwithstanding that, if that act had been done by a private person, he would have been liable. So the trustees of a turnpike road, if authorized to raise the road, would not be liable for any damage which such act might occasion, although a private individual would be if he had done the same thing; but it would be otherwise if the trustees had done their work so carelessly and negligently as to create such damage. I understand that the plaintiff complains that the defendants, in discharging their regular duty in keeping

the roads in repair, have been guilty of negligence, whereby he has been injured; and the facts appear to be, that when the trustees entered upon their duties as such trustees, they found open drains; and the objection to them was, that when a heavy fall of rain came there was a gush of water on the road, but which these open drains carried away to the canal, or it dispersed itself in such a way as to be wholly innocuous to the adjoining owners; that being so, in order to prevent the gush of water on the road, they are advised to disturb the state of things then existing and cover the drains, which had the effect of turning the water on to the adjoining owner's land, as the catchpits made to prevent that were not sufficient, and the plaintiff says that the trustees have been guilty of negligence and carelessness in so changing the state of things as to make the water accumulate on the adjacent lands, by reason of the catchpits being insufficient, and that they are further guilty for continuing them in such insufficient state; and I think that is a state of things upon which the jury might rightly have been asked, whether the defendants had been guilty of negligence, and I understand that it was so left to them, that supposing they found such a state of things to exist, that then they were to say whether the defendants had been guilty of negligence, and the jury have found that they were, and in this direction I can see nothing wrong. Then as to the question whether or not the plaintiff is bound to rely on the negligence of the defendants when the damage first occurred, or whether he can maintain his action after three months have elapsed from the first damage, I am of opinion that where the defendants have been guilty of negligence in the management of the highway over which they have charge, and that by reason of such negligence damage has been caused, which has been accompanied by a fresh damage, such a state of things brings the plaintiff within the time limited by the statute. There is no doubt that a fresh damage is no cause of action, and the case of Fetter *v.* Beale, 1 Salk. 11, is an authority upon that point. In that case an action was brought by the plaintiff for a blow he had received on the head, and which at the time appeared slight, and he obtained damages accordingly; but afterwards it turned out that the injury was of a more serious nature, and the plaintiff then brought a second action, but it was held that it would not lie, Holt, C. J., saying, "Every new dropping is a new nuisance, but here is not a new battery, and in trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of the damages which the jury must be supposed to have considered at the trial;" but here the plaintiff has been again damaged by reason of the defendants neglecting their duty, and is he to have no remedy at all? It seems impossible to suppose that such was contemplated by the act. Here it is not only the fresh damage, but the continuance of the original neglect that constitutes a new cause of action, and I think that this wrongful act may be a fresh cause of action. And I therefore am of opinion that on both points our judgment should be for the plaintiff. And now as to the verdict being against the weight of evidence, without going so far as to say that this verdict was against the evidence, yet, looking at it in all its bearings, I think it would be more satisfactory that they should be reinvestigated, on the condition that the defendants pay the costs of the former trial.

WILLES, J.—I am of the same opinion. As to the misdirection, it

appears that the jury were told to find for the plaintiff if they were of opinion that the defendants had, by the negligent construction of the catchpits, occasioned injury to the plaintiff. I assumed, therefore, that the jury found negligence on the part of the defendants, therefore there can be no reason for granting a new trial on the ground of misdirection. Then, as to the question on the Statute of Limitations, that is a question of considerable nicety. Certain expressions have fallen from the courts, and have been used, which have not applied to the particular facts of the cases in which they were made. After what my brother Williams has said, I do not think it necessary to refer to more than one decision, and that is the case of Bonomi *v.* Backhouse. The cause of action there was in respect of injury occasioned by the support to land being taken away. There the court threw out that it did appear the support was taken away, and that the cause of action was then complete. Then compare that case with the present. Here the cause of action is the injury to the land. It cannot be said that the plaintiff in this case had a right to say that the trustees should not make this work on the road. In Bonomi *v.* Backhouse, it was said that the plaintiff had a right to prevent the ground from being taken away where it would interfere with his supports. All that the plaintiff could do here was to demand that the works should be done in such a manner as not to injure his land; and each action was to be limited to such injury; and it appears to me that the Statute of Limitations ought to run from the time the damage was effected. With regard to the verdict being against the evidence, I need add nothing to what has already been said by my brother Williams.

BYLES, J.—I shall say nothing as to the misdirection, but I wish to say a word as to the limitation of time for bringing the action. The case of Bonomi *v.* Backhouse is a decision of the Court of Exchequer Chamber, and is binding upon us, and clearly establishes the law that the period runs, not from the act done, but from the damage itself, but it leaves the question open—does it run from the first damage, excluding all subsequent damage? or does it not say, may not there be a case where new damage gives a new cause of action? There the damage was one act; but here the damage arises from every shower, and every time there is a storm there is a new and distinct injury. With regard to the verdict being against the weight of evidence, I do not think that that was so; but, as this is a case of great importance, I think that in justice to both parties there should be a new trial, if the defendants are willing to pay the costs of the former one.

KEATING, J., concurred. Rule absolute.

AN

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AGREEMENT.

Construction of.

1. The plaintiff having claims against the defendant for the enforcement of which he had instituted a suit in Chancery, it was agreed, that, in consideration that the plaintiff would forbear to prosecute the suit and abandon the same and his claims, the defendant promised that he would, *out of the first moneys* he might receive from W. in respect of his claims upon him arising out of the B. railway contract, hand to the plaintiff the sum of 500*l.*, and, *out of any further moneys* he might receive from W. in respect of the same contract, 10*l.* per cent. upon the net amount which he might so from time to time receive, until such per centage to the plaintiff should amount to 1300*l.*, when all further payments by the defendant were to cease,—it being understood and agreed that the defendant would not compromise with W. without providing for the plaintiff the above-mentioned 1300*l.*, or so much of it as might remain due to him according to his promise.

One payment only (of 2000*l.*) having been made to the defendant by W. in respect of his claims arising out of the B. railway contract:—Held, that the plaintiff was only entitled to the 500*l.* thereout, and not to 10*l.* per cent. on the residue thereof. *Cochrane v. Green*, 448

2. In an action to recover the 500*l.*, the defendant pleaded, as to 339*l.*, that, before the commencement of the suit, the plaintiff was indebted to one S. S. in the sum of 339*l.*; that the defendant, at the request of the plaintiff, agreed with S. S. to pay him the 339*l.*, and S. S. agreed to accept the defendant as his debtor instead of the plaintiff for that sum; and that the defendant was still liable to pay the same to S. S.:—Held, no answer to the plaintiff's claim, inasmuch as the plea did not show that the plaintiff's liability to S. S. was discharged. *Id.*

3. On the 4th of June, the plaintiff wrote to

one T. C. as follows,—"I agree to take over the quarter of the ship Conrad on account of your debt to me, it being understood between us that I take delivery from the discharge of the cargo she has now on board after her arrival at S., all liabilities, &c., after being discharged to belong to me."

T. C. subsequently made an arrangement with his creditors, which was embodied in the following memorandum,—"July 14, 1858. We the undersigned agree to purchase the ships in the annexed statement, at the prices there put down, in the proportions set down opposite to our names, it being understood as part of this agreement that the debts owing by you to us as annexed be taken to their full amount in payment or part payment of the said purchases."

This memorandum was signed by the plaintiff as purchaser of sixteen sixty-fourths of the Conrad for 774*l.* on account of his debt of 810*l.* T. C. executed a bill of sale of the shares to the plaintiff on the 14th of September, which was registered on the 18th.

On the 30th of September, the defendant entered into the following contract with the plaintiff,—"I have this day bought from you sixteen sixty-fourth shares of the barque Conrad, now registered in your name at the custom-house, for the sum of 700*l.* and *all liabilities* or profits *on the said shares from the time of your purchase from Mr. T. C. for which you are liable as owner in any way*, or entitled to if there be any profits or balance in your favour. It is understood and agreed that the said liabilities, if any, are to be assumed and paid by me over and above the aforesaid sum of 700*l.*; and if, on the other hand, there is any balance or profits coming to you on the said shares, the same is to belong to me, and I am to receive the same for my own private benefit."

The terms of this agreement were afterwards embodied in a bill of sale, which was registered on the 15th of November.

The ship's husband having incurred certain debts for necessaries supplied to the ship between the 31st of July and the 8th of August, the plaintiff paid the amount, and sued the defendant, who it appeared had notice of the memorandum of the 14th of July, but not of the letter of the 4th of June:—Held, that the plaintiff was not entitled to recover, inasmuch as there was no evidence to show that he had incurred any legal liability to T. C. in respect of the goods so supplied. *Chapman* v. *Callis*, 769

4. Whether the plaintiff was precluded by the 55th section of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, from suing upon the agreement of the 30th of September,—*quære?* *Id.*

Consideration for.

5. A promise based on the consideration of doing that which a man is already bound to do, is invalid; and it is not necessary, in order to invalidate the consideration, that the plaintiff's prior obligation to afford that consideration should have been an obligation to *the defendant:* it may have been an obligation to a third person. Per Byles, J. *Shadwell* v. *Shadwell*, 159

6. A. wrote to B. as follows,—"I am glad to hear of your intended marriage with E. N.; and, as I promised to assist you *at starting*, I am happy to tell you that I will pay to you 150*l.* yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas. Your ever affectionate uncle, A." In an action against A.'s executors for arrears of the annuity, the declaration alleged the consideration for the promise to be, "that the plaintiff would marry E. N."

Held, by Erle, C. J., and Keating, J., that the promise was binding, and made upon good consideration. Held, by Byles, J., that the letter was no more than one of kindness, creating no legal obligation.

Held, by the whole court, that B.'s continuance to practise was not a condition precedent to his right to the annuity. *Id.*

AMENDMENT.

Of Record at the Trial.

1. Where an amendment at the trial merely consists in the correction of a blunder in the statement of the contract, and does not vary the real question the parties came to try, the judge is warranted in allowing it without imposing any condition. *St. Losky* v. *Green*, 370

2. A count stated that the defendants contracted to sell to the plaintiffs a cargo of "Merthyr coal *of the description called through and through*, to be hand-picked." This description being proved at the trial to be inconsistent and unintelligible, and the real contest being whether or not the contract was for "hand-picked coal," the judge amended by striking out the words in italics, the costs of the amendment being defendants' costs in the cause. The jury having found for the plaintiffs,—Held, that the amendment was properly made. *Id.*

ANCIENT LIGHTS.

Alteration in Position of, on rebuilding Premises.

In an action for obstructing ancient lights, the facts stated in a special case were as follows:—The plaintiffs and defendants possessed premises opposite to each other in the city of London; the plaintiffs' premises, in which were windows which had been used for more than twenty years, having been burnt down, the plaintiffs rebuilt them, but, in the newly erected building, the windows were placed in different situations, were of different sizes,

and altogether occupied more space than those in the old building; some parts of the new windows coincided with some parts of the old ones, but a great portion of the old and new windows did not coincide.

In the special case it was stated that "the defendants could not have obstructed the passage of light to such portions of the windows of the plaintiffs' new building as were new, without at the same time obstructing the passage of light to such portions of the plaintiffs' new windows as were in the sites of the old windows, to the extent stated in the declaration:"—

Held, by the Exchequer Chamber,—affirming the judgment of the court below,—that, as none of the new windows occupied the same position as any one of the ancient windows did, no right was acquired in respect of any of them against the plaintiffs. *Hutchinson* v. *Copestake*, 863

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ARBITRAMENT.

Order to refer on the usual Terms.

1. A summons to refer a cause was endorsed "By consent, order upon the usual terms." The order having been drawn up without a power in the arbitrator to amend, a judge at Chambers made a subsequent order to amend it by inserting that term:—Held, that such last-mentioned order was properly made. *Thompsett* v. *Bowyer*, 284

Appointment of Arbitrators.

2. An agreement between A. and B. contained the following clauses,—"In every case of any difference between the parties hereto, or their representatives, whether touching the true intent or construction of this agreement or of anything therein expressed, or touching anything to be done or omitted in pursuance of this agreement, or as to any of the incidents or consequences thereof, or otherwise relating to the premises, the matter in question shall be referred to arbitration." "Every such reference shall be made to two persons, one to be named by each party." "If either party for fourteen days after being requested by the other party to name an arbitrator, fail so to do, then both arbitrators may be named by the party making such request."

Differences having arisen, A. appointed an arbitrator, but B. declined to do so on request, whereupon A. appointed a second arbitrator; and the two proceeded to hear and dispose of the matter.

The appointment of the arbitrators purported to be made by A. *and one C.* (who was said to be an encumbrancer on A.'s presumed interest under the agreement) *severally*, and the notice was also given by A. *and C.*:—Held, that the appointments were not vitiated by the introduction of the name of C. *In re Haddan and Roupell*, 683

3. Held, also, that it was not necessary in the appointment of the arbitrators to particularize the matters to be arbitrated upon. *Id.*
4. Held, also, that the request to B. to appoint an arbitrator was not rendered invalid by its requiring him to notify the appointment to the solicitors who had been acting for A. throughout the matter, instead of to A. himself. *Id.*

Conduct of Reference.

5. It is competent to arbitrators under the Friendly Societies Act to decline to hear counsel. *In re Macqueen and the Nottingham Caledonian Society*, 793
6. *Semble*, that all arbitrators have the like discretion. *Id.*
7. It is no ground for setting aside an award that the arbitrator (the master) declined to accede to the defendant's request that he would have a view. *Munday* v. *Bluck*, 557
8. The court will not send an award back to the master in order that he may state a case, which at the hearing he has declined to do. *Holloway* v. *Francis*, 559

Under the Common Law Procedure Act, 1854.

9. References to the master under the Common Law Procedure Act, 1854, stand on the same footing with regard to applications to set aside or send them back for reconsideration as ordinary references. *Holloway* v. *Francis*, 559
10. The court, therefore, will not send an award back to the master in order that he may state a case, which at the hearing he has declined to do. *Id.*

Order for Payment of Money under 1 & 2 Vict. c. 110.

11. The court refused a rule for payment of money under an award, where it appeared that the costs (unascertained) of certain proceedings in Chancery were payable to the other party under the same award. *Lambe* v. *Jones*, 478

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ARTICLES.

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ASSAULT.

Certificate of Justices under 9 G. 4, c. 31, s. 27.

The plaintiff laid an information for an assault

under the 9 G. 4, c. 31, s. 27, and took out a summons, which was served on the defendant. Afterwards, and before the day for hearing, the plaintiff, by his agent, gave notice both to the defendant not to attend, and to the magistrates' clerk that *he* should not attend. The defendant attended, and claimed to have the information dismissed, and a certificate of dismissal granted under the statute, notwithstanding the plaintiff's absence:—Held, upon the authority of Tunnicliffe *v.* Tedd, 5 C. B. 553, that the magistrates were warranted in granting such certificate, and that the certificate was a bar to an action for the same assault. *Vaughton*, app., *Bradshaw*, resp., 103

ASSURANCE.

See INSURANCE.

ATTORNEY.

Articles of Clerkship.

1. *Stamping under* 19 & 20 *Vict.* c. 81, *s.* 3.]—Where there has been an omission to stamp articles of clerkship within six months from the date of their execution, but they have subsequently been stamped and the penalty paid, under the 19 & 20 Vict. c. 81, s. 3,—the court will allow the service under them to be computed from the date of their execution, instead of from the date of the filing of the affidavit under the 6 & 7 Vict. c. 73, ss. 8, 9, provided it is shown to their satisfaction that the non-payment of the duty at the proper time arose from unforeseen emergency, and not from intentional neglect or design. *Ex parte Bishop*, 150

Agreement with Client for more than Legal Charges.

2. A contract whereby an attorney stipulates with a client to receive, in consideration of the large advances requisite to the conducting the proceedings to a successful issue, over and above his legal costs and charges, a sum which should be commensurate with his outlay and exertions, and with the benefit resulting to the client,—is void on the ground of maintenance. *Earle* v. *Hopwood*, 566

Retainer by a Corporation,—See MUNICIPAL CORPORATION.

AUTHORITY.

See DEED.

BANKRUPT.

Affidavit of Debt under 12 & 13 *Vict.* c. 106, *s.* 86.

The plaintiff, a builder's piece-master, was employed to do certain carpenter's and joiner's work to certain houses for the defendant, for a given sum. Before the whole work was completed, the defendant discharged the plaintiff, who thereupon sued him for an alleged balance of 178*l.* 7*s.* 7*d.* for work and labour and money paid: and he also filed an affidavit in bankruptcy in which he alleged that the defendant was indebted to him in that sum for work and labour and money paid. At the trial, the jury found a verdict for the plaintiff for 100*l.* only:—Held, that the defendant was entitled to costs under the 12 & 13 Vict. c. 106, s. 86,—there being no reasonable or probable cause for swearing to that as a debt, which, as to a part at least, was only a claim for unliquidated damages. *Pratt* v. *Geswell*, 719

BARON AND FEME.

See HUSBAND AND WIFE.

BILL OF EXCHANGE.

Form of.

1. *Promissory note.*]—An instrument purporting on the face of it to be a bill of exchange drawn by A., payable to the plaintiff or order, was accepted by B., and handed to the plaintiff in satisfaction of a claim for rent due to her from A. In the place where the direction to the drawee is usually found, the name and address of the payee were inserted. The whole instrument (except the drawer's name) was in the handwriting of B.:—Held, that the payee was entitled to recover upon it as a promissory note. *Fielder* v. *Marshall*, 606

Conditional Acceptance.

2. A bill was accepted by the defendants,—"Payable on giving up bill of lading for 76 bags of clover-seed per Amazon, at the London and Westminster Bank, Borough Branch:"—Held that this was a conditional acceptance to this extent, that the holders were only entitled to receive the amount on delivering over to the acceptors the bill of lading; but that they were not bound to present the bill on the precise day on which it became due. *Smith* v. *Vertue*, 214

BIRKENHEAD DOCKS.

See LIVERPOOL DOCKS.

BIRMINGHAM CANAL ACT.

Construction of.

1. By a canal act it was enacted that no owner or proprietor of any mines or minerals, &c., should open or carry on any work for digging, getting, or discovering such mines or minerals under any tunnel, or within twenty yards of the same, without the consent of the company; and by a subsequent section it was provided, that, when the owner or proprietor of any coal-mine, limestone, or other minerals lying under the said canal,

towing-paths, and other works, or within the distance thereinbefore limited, should be desirous of working the same, such owner or proprietor should give three months' notice in writing of such his intention to the clerk of the company, and that, if the company should refuse to permit the minerals to be worked, they should pay to the owner or proprietor such compensation as (in the event of the parties disagreeing as to the amount) should be assessed by a jury.

The plaintiffs,—who were lessees of a mine adjoining the canal, under a lease wherein they covenanted with the lessors that they would without intermission or delay work the mines thereby demised, and raise and get coal and ironstone thereout, until the whole of the said mines, or as great a quantity thereof as by working the said mines in a diligent and effectual manner could or might be gotten, should be worked out, *except the ribs or pillars which must necessarily or which the lessors might require to be left*,—having given the company notice of their intention to work their mine within the prescribed distance of a tunnel, a jury was impannelled to assess the compensation to be paid to them by the company on their refusal to permit them to do so.

In an action to recover the sum so assessed, the company pleaded the covenant above referred to, and alleged that the minerals which the plaintiffs so ceased and abstained from working, and the said coal and ironstone which they so left ungotten, were a rib within the meaning of the covenant, and that, before the time when the plaintiffs first ceased and abstained as in the declaration mentioned, the lessors required the said minerals, &c., above mentioned, to be left by the plaintiffs under the covenant as and for such rib as aforesaid, and of such their requirement duly gave notice to the plaintiffs:—Held, no answer to the action,—the plea disclosing no *covenant*, but merely a partial exoneration from the obligation fully to work the mine,—or, assuming it to be a covenant, it not being one for which a special performance could be enforced in equity, or substantial damages awarded in an action at law. *Swindell* v. *The Birmingham Canal Company*, 241

The defendants further pleaded,—that the plaintiffs did not cease and abstain from working the said minerals within twenty yards of the tunnel aforesaid as alleged,—and that, after the service of the notice in the declaration first mentioned, and after the defendants' refusal to permit the plaintiffs to work the minerals mentioned in the notice, and after they caused the plaintiffs to be served with a notice in the declaration secondly mentioned, the plaintiffs waived and abandoned the first-mentioned notice, and claimed to work and did work and carry away the minerals in the said notice mentioned:—

Held, that neither of these pleas afforded any answer to the action. *Id.*

BOROUGH FUND.

See MUNICIPAL CORPORATION.

BRITISH WINE.

See SUNDAY.

CALIFORNIA.

Service of Writ on a British Subject in,—*See* PRACTICE, 1, 2.

CERTIFICATE.

Under 9 G. 4, c. 31, s. 27,—*See* ASSAULT.

CHARTER-PARTY.

See SHIPPING.

CHURCH-RATE.

Notice of Vestry Meeting.

1. A notice of a meeting at which a church-rate was made was given in these terms,—"The churchwardens, overseers, and *other principal inhabitants* of *this parish* are requested to meet *in the vestry* on, &c., at, &c., to examine the churchwardens' accounts and *to grant them a rate*:"—

Held, a sufficient notice within the 58 G. 3, c. 69, s. 1, and 7 W. 4 & 1 Vict. c. 45, s. 2, although it was sworn that there were several *principal inhabitants* of the parish who were not in a position to be rated, and several others who *were* rated but were not *inhabitants*. *Rand* v. *Green*, 470

Quaker.

2. There is nothing in the statutes 7 & 8 W. 3, c. 34, s. 4, 1 G. 1, stat. 2, c. 6, s. 2, or 53 G. 3, c. 127, s. 6, to exclude a Quaker from the operation of the general rule that the summary jurisdiction of justices to enforce payment of a church-rate ceases when a matter of title comes into question bonâ fide before them. *Backhouse*, app., *Bishopwearmouth, Churchwardens*, resp., 315

For Repayment of Money borrowed under the Church Building Acts.

3. Where money is borrowed by churchwardens for the repair of the parish church in pursuance of the Church Building Act, 59 G. 3, c. 134, s. 14,—*Quære*, whether a rate made for payment in one year of a larger sum than one-tenth of the principal is bad for excess? *Id.*

COMMISSION.

See HUSBAND AND WIFE.

COMMON.

Rights of,—*See* HAINAULT FOREST.

Enclosure of,—*See* ENCLOSURE.

[COMMON CARRIER.

See RAILWAY COMPANY.(2)]

COMMON LAW PROCEDURE ACT, 1852.

Section 18.—*Service of Writ on British Subject abroad,*—*See* PRACTICE, 1.

Section 222. *Amendment of the Record at the Trial,*—*See* AMENDMENT, 1, 2.

COMMON LAW PROCEDURE ACT, 1854.

Section 8. *Compulsory Reference,*—*See* ARBITRAMENT, 9, 10.

CONDITION PRECEDENT.

See AGREEMENT, 6.

CONDITIONAL ACCEPTANCE.

See BILL OF EXCHANGE, 2.

CONTRACT.

See AGREEMENT.

COPYRIGHT.

Dramatising a Novel.

Dramatising a novel and causing it to be represented on the stage without the author's consent, is no infringement of his copyright therein. *Reade* v. *Conquest*, 755

CORPORATION.

See MUNICIPAL CORPORATION.

CORPORATION BONDS.

See THAMES CONSERVANCY.

COSTS.

In Slander, under 21 *Jac.* 1, *c.* 16, *s.* 6.

1. The 21 Jac. 1, c. 16, s. 6,—which provides, that, in actions for slanderous words, if the plaintiff recovers less than 40*s.* damages, he shall only recover the same amount of costs,—is not repealed by the 3 & 4 Vict. c. 24. *Evans* v. *Rees*, 391

Of Motions and Rules.

2. The jury having found a verdict for the plaintiff for 80*l.*, the court, upon a rule to reduce the damages to a nominal sum, proposed to make the rule absolute for a new trial unless the plaintiff would consent to a verdict for 40*l.*:—Held, that the plaintiff was still entitled to the costs of the rule, though he assented to the reduction. *Wilson* v. *The Lancashire and Yorkshire Railway Company*, 632
3. A rule which does not ask for costs cannot be made absolute with costs. *Gleddon* v. *Trebble*, 367

Of Appeal against a Highway-Rate,—*See* HIGHWAY-RATE.

And see MAINTENANCE.

[COUNSEL.

Effect of Admission by.

See EVIDENCE, II.]

COUNTY COURT.

Commitment for Perjury,—*See* MALICIOUS PROSECUTION.

COVENANT.

What amounts to,—*See* BIRMINGHAM CANAL ACT, 1.

CUSTOM OF LLOYD'S.

See INSURANCE.

DAMAGES.

Measure of, in Action against Carrier for Negligence.

1. The plaintiff, a cap manufacturer at Cockermouth, bought cloth at Huddersfield for the purpose of making it up into caps, which he was in the habit of selling through the country by means of travellers. The cloth was delivered to the defendants on the 15th of March to be carried by their railway to Maryport; but, through the negligence of the company's servants, it was sent to Bull Gill station, and did not reach the plaintiff's hands until the 12th of April, which was too late for the plaintiff's purpose.

   In an action against the company for not delivering the cloth within a reasonable time,—Held,—in accordance with the rule in Hadley v. Baxendale, 9 Exch. 341,—that the plaintiff was entitled to recover as damages the amount of the diminution in value of the cloth by reason of the season for making up and selling the caps having passed, but not the loss of anticipated profits, or the expense of travellers despatched on journeys rendered fruitless by reason of the inability to execute their orders. *Wilson* v. *The Lancashire and Yorkshire Railway Company*, 632
2. The jury having found a verdict for the plaintiff for 80*l.*, the court, upon a rule to reduce the damages to a nominal sum, proposed to make the rule absolute for a new trial unless the plaintiff would consent to a verdict for 40*l.*:—Held, that the plaintiff was still entitled to the costs of the rule, though he assented to the reduction. *Id.*

DANGEROUS NUISANCE.

See NUISANCE.

DEED.

What amounts to a Redelivery.

A deed was executed by a son of the defendant, thus,—"John William Foulkes for Thomas Foulkes" (the defendant). In an action upon a covenant contained in the

deed, the defendant pleaded non est factum. It was proved, that, the deed being shown to the defendant executed as above, he was asked whether his son had authority to execute it for him, and whether he adopted his son's act, to which the defendant answered in the affirmative:—Held, that this amounted to a redelivery of the deed, and sustained the issue. *Tupper* v. *Foulkes*, 797

DEFAMATION.

See LIBEL.
SLANDER.

DEVISE.

Construction of.

Estate for life or in tail.]—Devise of lands to trustees, upon trust "to permit and suffer W. J. to occupy and enjoy, or to receive and take the rents, issues, and profits thereof for his own use and benefit during his natural life; and, after the decease of W. J., then to permit and suffer *the heirs male of his body* to occupy and enjoy the same, or to receive and take the rents, issues, and profits thereof for their several natural lives, in succession, according to their respective seniorities, or in such parts and proportions, manner and form, and *amongst them*, as the said W. J., *their father*, shall by deed or will direct, limit, or appoint; and, in default of such issue male, of the said W. J., then over:"—

Held—in the Exchequer Chamber,—by Cockburn, C. J., and Wightman, J., that W. J. took an estate for life only; and by Martin, B., and Channell, B., that he took an estate tail. *Jordan* v. *Adams*, 483

ENCLOSURE.

Construction of Provisional Order of Enclosure Commissioners.

Setting out roads.]—It is competent to the enclosure commissioners, under the 8 & 9 Vict. c. 118, to order the valuer to set out a private or occupation road over land directed by the provisional order to be allotted to an individual in lieu of his rights in the lands to be enclosed, unless the provisional order expressly declares that his allotment shall be exempt from such a burthen. *Grubb* v. *The Enclosure Commissioners*, 612

And see HAINAULT FOREST.

EQUITABLE SET-OFF.

See PLEADING, 5.

ESTOPPEL.

See INSURANCE.

EVIDENCE.

I. *Parol Evidence to vary a Written Contract.*

1. The plaintiff,—the proprietor and publisher of certain vehicles for advertisements called "Hotson's Local Time Tables," received from one M. (who was a canvasser for orders on commission) the following memorandum:—"Insert my advertisemants for one year in Hotson's Local Time Tables,—the Great Northern and [six other railways, naming them]. Space to be two squares in back page; and charge for insertion to be 10*s.* in each monthly book, 10*s.* per month each book. T. E. M. 28/6/59. (Signed) B. Browne & Co." The signature and the words "10*s.* per month each book," were in the handwriting of the defendant, and the initials "T. E. M." those of the agent M.

The publication in question consisted of printed copies of the time-bills of the several railways, with various advertisements annexed thereto. M. had not been specifically employed by the plaintiff to procure the order from the defendant; but he was in the habit of collecting orders for advertisements for him, which the plaintiff adopted if he approved of them. The defendants' advertisements were accordingly inserted each month in each of the seven time-tables, and this action was brought for the agreed price.

The defence being that the defendant was induced to sign the contract by the misrepresentation of M. at the time that the charge was to be 10*s.* per month for the seven books,—it was proposed at the trial to ask the defendant, who was called as a witness, what representations M. had made to him when he obtained the order from him; but the judge declined to allow the question to be put, inasmuch as it was an attempt to vary by parol a written contract:—

Held, that the defendant's proposal being in terms adopted by the plaintiff, the evidence was properly rejected. *Hotson* v. *Browne*, 442

2. Held also, that, assuming M. to have been the plaintiff's agent in the transaction, evidence of what passed between him and the defendant at the time of giving the order would have been admissible if the issue between the parties had been whether the defendant had been induced to sign the memorandum by fraud. *Id.*

[II. *Admissions of Counsel.*

1. Where a party appears by counsel before the court or a judge at Chambers in any stage of the cause, and counsel makes an admission of a fact, though unsupported by affidavit, the court will regard such statement as presumably true, and will admit it in evidence when offered by the other side. *Haller* v. *Worman*, 892

2. In an action of detinue to recover possession of certain papers, the defendant took out a summons before a judge at Chambers to change the venue, and appeared by counsel to support the application. In the course

of the proceedings before the judge, counsel admitted that his client had the papers:

Held, that this admission was rightly received in evidence at the trial of the cause, as a statement made by counsel in discharge of his functions as counsel, relevant to the matter at issue, and made for the purpose of influencing the judge to take a step in favour of his client:

Per Williams, J.: When counsel makes before the court or a judge a statement, or does an act in the presence of the attorney on the record, or any authorized person who represents him, and the statement or the act is not repudiated by the attorney or his representative, that amounts to an assent to or adoption of it, and it becomes the statement or act of the attorney. *Id.*

III. *Letters of Deceased Agent, to disprove Authority.*

1. Letters written by a deceased agent to his principal subsequently to the date of an agreement alleged to have been made by him on behalf of the principal, detailing conversations with the other party, are not admissible on behalf of the principal to prove that no such agreement was entered into, or that the agent was not authorised to make it, and that the principal never knew of nor ratified it. *Turner* v. *Hutchinson*, 897
2. Although the alleged agreement was verbal only, and the agent afterwards, and after the writing of the letters, signed a written agreement confirming the verbal one, the letters are inadmissible to prove that the agent was not authorised to sign the written agreement. *Id.*
3. It makes no difference that the agent is dead, unless the letters were written at the time of the conversations detailed, and it was the agent's duty to communicate them to his principal at that time. *Id.*]

EXECUTORY AGREEMENT.

See AGREEMENT, 3, 4.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FRAUDULENT REPRESENTATION.

See EVIDENCE, 2.

FRIENDLY SOCIETY.

Arbitration Clause.

1. It is competent to arbitrators under the Friendly Societies Act to decline to hear counsel. *In re Macqueen and The Nottingham Caledonian Society*, 793
2. *Semble*, that all arbitrators have the like discretion. *Id.*

GAME.

Trespass in Pursuit of, under 1 *&* 2 *W.* 4, *c.* 32, *s.* 30.

Justices have no power to entertain a complaint for an alleged trespass in pursuit of game, under the 1 & 2 W. 4, c. 32, s. 30, where the defendant sets up a bonâ fide claim of right; and of this the justices are the judges. *Legg*, app., *Pardoe*, resp., 289

GENERAL AVERAGE STATEMENT.

See PRACTICE, 4.

HANDBILL.

See LIBEL.

HAINAULT FOREST.

Rights of Common over.

1. The forest of Hainault, at the time of the passing of the disafforesting act, 14 & 15 Vict. c. 43, comprised certain open commonable lands, called the King's Forest or King's Woods, in the parishes of Barking and Dagenham (within the manor of Barking), containing 2842 acres, and another tract of waste in the parishes of Chigwell, Lambourne, and Stapleford Abbotts, consisting of 1104 acres, and also a piece of woodland called Tom's Wood Hill containing about 44 acres. The rest of the forest consisted of enclosed land in the several parishes of Barking, Dagenham, Chigwell, Lambourne, and Stapleford Abbotts.

By the 21 & 22 Vict. c. 37, "an act to provide for the allotment of the commonable lands within the boundaries of the late forest of Hainault,"—after reciting, amongst other things, that there were within the boundaries of the late forest of Hainault, in addition to the commonable lands within that part of the said forest which is situate within the parishes of Barking and Dagenham, and usually known as the King's Forest or King's Woods, divers other commonable lands situate in various other parishes, and that doubts existed whether the Crown and the persons possessing rights of common within the boundaries of the said late forest were entitled to exercise them over all commonable lands within the boundaries of such forest, or only over such of the said commonable lands as lay in the same parish or district as the lands in respect of which such rights were claimed, and that it was expedient that provision should be made for setting out a part of the unallotted portion of the King's Forest or King's Woods, containing 969*a.* 3*r.* 17*p.*, to the Crown and other the persons entitled to common of estovers or fuel assignments, and for dividing and allotting such part between them in satisfaction of their said rights, and that it was also expedient to ascertain and define the commonable lands within the boundaries of the said late forest,—it was by s. 6 enacted that the commissioner appointed to carry the act into execution "should cause a plan to be made showing what commonable lands

were then situate within the boundaries of the King's Forest or King's Woods, as such several boundaries were respectively defined by the award of the commissioners mentioned in the said act (14 & 15 Vict. c. 43) and the plan therein referred to, and that the plan so to be made should also show the said unallotted lands containing 969*a.* 3*r.* 17*p.* in the King's Forest or King's Woods, and what portions thereof had been allotted to the said fuel rights, &c.; and further, that the said commissioner should ascertain and determine by his award thereby directed to be made, whether the rights of common, or any of them, other than the said fuel rights, in the said late forest of Hainault, *extend indiscriminately over all the said commonable lands which he might find to be situate within the boundaries of the said late forest, including the unallotted portion of the King's Forest or King's Woods, or whether such rights, or any of them, are limited to the commons in the particular parish, district, or place in which are situate the lands in respect of which the rights are claimed, or what is the nature of such rights;* and that, in case the said commissioner should find that the rights of common, or any of them, are exerciseable generally over all the commonable lands within the said late forest, or over any other commonable lands than those in the parish, district, or place in respect of which the rights exist, or if the commissioner should find that the inhabitants of the parish in which the commonable lands in the King's Forest or King's Woods are situate are alone entitled to rights of common over such lands, then the said commissioner should by his award set out a specific portion of the said commonable lands in any part of the said late forest of Hainault to each parish, district, or place in which the inhabitants have rights of common, as and for a common for such parish, district, or place, and thenceforth the right of such parish, district, or place, or of the persons therein entitled to any such rights of common, should, as regards such rights of common, be confined to such specific portion so set out and apportioned as aforesaid, and in lieu of the general or other right of common over the whole or any part of the unenclosed lands aforesaid; and that all rights of intercommonage should upon the execution of the commissioner's award cease and determine, and such allotments of specific rights of common in respect of each such parish, district, or place should be made with reference to the whole amount of commonable land and the extent of the rights of the commoners in respect of each such parish, district, or place for which an allotment should be so made as aforesaid; and that his decision in the premises should be final and binding on all parties,"—subject to a case to be stated for the opinion of the Court of Common Pleas. And it was further provided that "all encroachments made since the award of the commissioners under the 14 & 15 Vict. c. 43 on any part of the said 969*a.* 3*r.* 17*p.* within the boundaries of the King's Forest or King's Woods should be deemed to be part of the lands to be allotted under the provisions of the said act."

The evidence as to the rights of common of the commoners of the five parishes of Barking, Dagenham, Chigwell, Lambourne, and Stapleford Abbotts, consisted of acts of user for more than sixty years previously to and down to the time of the disafforestation, and was to this effect,—that a reeve was appointed for each of the five parishes, whose duty it was to mark the cattle of the persons entitled to common in their respective parishes; that the marking usually took place near the boundary of the King's Forest or King's Woods, and within the parish to which the cattle so marked belonged; that the cattle were generally turned out at the spot where they were marked, *and then went where they pleased,*—those turned on to the King's Forest or King's Woods straying all over the other commonable land in the forest in the parishes of Chigwell, Lambourne, and Stapleford Abbotts, and those turned on to the commonable lands in the last-mentioned parishes straying over the King's Forest or King's Woods.

The commissioner by his award found that "the rights of common which are exerciseable in respect of those parts or districts of the several parishes of Barking, Dagenham, Stapleford Abbotts, Lambourne, and Chigwell, which lie within the boundaries of the said forest, as ascertained as aforesaid, are exercised exclusively over the commons or commonable lands hereinbefore mentioned situate within such last-mentioned parishes, including the King's Forest or King's Woods; and that the last-mentioned rights of common, or any of them, are not limited to the commons in the particular parish, district, or place, in which are situate the lands in respect of which the said rights are claimed; but that the said rights claimed for each of the last-mentioned parishes, districts, or places, extend indiscriminately and generally over all the said commons or commonable land in each and every of the same parishes, districts, or places, including the King's Forest or King's Woods:"—

Held, upon a case stated for the opinion of the court,—that the decision of the commissioner was warranted by the evidence, and the matter within his jurisdiction. *In re The Hainault Forest Act,* 648

2. As to Tom's Wood Hill,—which consisted principally of bushes and fern, with some small pieces of open pasture,—the evidence of user was similar to that relating to the

rest of the unenclosed lands: but it appeared in addition, that, in 1827, fifteen acres of it (not now in question) had been enclosed by a former owner without interruption, and that, in 1856, other eight acres of it had been exchanged by the present owner for other land belonging to the commissioners of woods and forests, and that the residue was then enclosed together with the land acquired by the exchange:—

Held, that there was nothing in the evidence to take Tom's Wood Hill out of the general decision of the commissioner. *In re the Hainault Forest Act*, 648

HIGHWAY-RATE.

Costs of Appeal.

1. Upon an application to justices to enforce payment of a highway-rate pursuant to the provisions of the 12 & 13 Vict. c. 45, s. 5, and 11 & 12 Vict. c. 43, s. 27, notice of appeal was given under the 5 & 6 W. 4, c. 50, s. 105, and recognisances duly entered into. The appeal was entered, and upon the hearing the rate was confirmed, subject to a case: the clerk of the peace made a note in the minute-book of the sessions,—"Costs agreed to be taxed out of court:" the order of the sessions was afterwards confirmed, and the costs were at a subsequent time taxed and allowed at 33*l.* 7*s.*

Nothing was said at the sessions about the costs; but by a rule of sessions made in 1843, it was ordered that "the costs of every appeal tried should be taxed by the clerk of the peace during the same sessions, and be paid by the party against whom the court should decide such appeal, unless the court should then make any order to the contrary:"—

Held, that the magistrates were justified in granting a distress-warrant upon the certificate of the clerk of the peace that the costs had been demanded and were unpaid, although there was no express order of sessions for the payment of costs,—such order being tacitly supplied by the rule of practice known to both parties. *Freeman*, app., *Read*, resp., 301

2. Held, also, that it was not competent to the appellant under the circumstances to object that the taxation had taken place out of sessions, that having been brought about by his own consent. *Id.*

HORSE-DEALER.

See WARRANTY.

HUSBAND AND WIFE.

Acknowledgment taken abroad under 3 & 4 *W.* 4, *c.* 74.

1. *Enlarging time for return of the commission.*]—The court will enlarge the time for returning a special commission for taking the acknowledgment of a married woman abroad, where it has been *duly* executed, but its return has been unavoidably delayed until after the return day therein named. *In re Van Ufford*, 789
2. The court will not enlarge the time for returning a special commission for taking the acknowledgment of a married woman abroad, where it has been executed *after* the return day named therein. *In re Mary Ann Carter*, 791
3. *Defective jurat.*]—The court allowed a commission, with the certificate of acknowledgment and affidavit of verification, to be received and filed, notwithstanding the omission of the month in the jurat of the affidavit. *In re Van Ufford*, 789

Conveyance of Wife's Property under 3 & 4 *W.* 4, *c.* 74, *s.* 91.

4. Upon a motion under the 3 & 4 W. 4, c. 74, s. 91, to dispense with the concurrence of the husband in a conveyance of the wife's separate interest in certain property, the court, in addition to an affidavit that the parties were living apart by mutual consent, and that the husband had been applied to but had refused to execute the conveyance, required an affidavit negativing the wife's receipt of any allowance from her husband. *Ex parte Mackarinah Fish*, 715

INSPECTION OF DOCUMENTS.

See PRACTICE, 3, 4, 5.

INSURANCE.

Custom of Lloyd's.

The plaintiff, a shipbuilder in London, employed one W., an insurance-broker, to effect a policy upon a ship at Lloyd's, and, after the happening of a loss, gave W. the ship's papers for the purpose of enabling him to adjust the loss with the underwriters. The policy was effected in W.'s name, and he retained possession of it. An adjustment having taken place, the loss was settled,—in accordance with a usage prevailing at Lloyd's, which was found to be generally known to merchants and shipowners, but which the jury found was not known *to the plaintiff*, who had merely left the policy in W.'s hands for safe custody,—by the underwriter setting off the amount payable by him upon the policy against the balance due to him from the broker for premiums on other policies effected by him:—

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that, assuming that the plaintiff was estopped from denying that the broker had authority to receive the amount due from the underwriter on the policy *in money*, he was not bound by the usage, and, consequently, that he was entitled to recover the

amount of the policy against the underwriter, notwithstanding such settlement. *Sweeting* v. *Pearce*, 534

JOINT STOCK COMPANY.

Director interested in Contract.

To a count on a contract under which the defendants, a gas company, were to pay the plaintiff a certain sum for erecting buildings, &c., and laying down pipes and mains for the company, the defendants pleaded "for defence on equitable grounds," that, before and at the time of making the agreement, the company was registered pursuant to the 7 & 8 Vict. c. 110; that the agreement was made and entered into before the passing of the Joint Stock Company's Act, 1856, and whilst the first-named act remained in full force; that the plaintiff before and at the time of making the contract was a director of the company; that, whilst such director, he was concerned and interested in the contract; and that, whilst such director and so interested and concerned, he voted and acted as a director on the subject of the contract, contrary to the first-mentioned act:—Held, that the plea was a good answer. *Steare* v. *South Essex Gas-Light and Coal Company*, 180

JUDGMENT.

Assignment of, under the Mercantile Law Amendment Act, s. 5.

A., who was jointly liable with nine other persons, having been taken under a ca. sa., paid the entire debt:—Held, that he was entitled, by virtue of the 5th section of the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, to an assignment of the judgment; and that, in an action against the judgment-creditor to enforce such assignment, a plea that the judgment had been satisfied by payment by A. after he had been taken in execution under it, was no answer. *Batchellor* v. *Lawrence*, 543

JUSTICES OF PEACE.

See MAGISTRATES.

LANDLORD AND TENANT.

Evidence of Tenancy.

A. let premises to B. for a term which expired at Lady Day, 1858. B. had underlet them for the whole term to C., who continued in possession; and B. afterwards sued him for the half-year's rent accruing at Michaelmas, 1858. The only evidence to show that B. still continued tenant of the premises to A. was, that, *after action brought*, he paid to A. and A. accepted the half-year's rent which would have been due from him assuming his tenancy to have been still subsisting:—Held, in the Exchequer Chamber, by Wightman, J., Crompton, J., and Hill, J.,—dissentientibus Bramwell, B., and Channell, B.,—affirming the judgment of the court below,—that there was evidence for the jury that B.'s tenancy under A. continued, and consequently that the action was maintainable. *Levy* v. *Lewis*, 872

LETTERS PATENT.

Construction of Specification.

1. The use of a roller and a bowl for calendering woven fabrics, and the means of regulating the relative speed of their motion, were well known. In the process of calendering, the roller was smooth and the speed of the roller and the bowl was unequal: in embossing the roller was patterned, and the speed of the roller and the bowl was equal.

   The plaintiff took out a patent for a combination of the patterned roller with unequal speeds of the roller and the bowl:—Held, that the alleged invention was void for want of novelty and utility. *Ralston* v. *Smith*, 117

2. The plaintiff, having found that one description of roller only would answer, entered a disclaimer; and, by his amended specification, confined his claim to one kind of substance for the roller, viz., a hard metal, and one kind of pattern for engraving thereon, viz., circular grooves round the roller:—Held, that this was practically a claim for a new invention, and not a part of any invention comprised in the original specification. *Id.*

LIBEL.

Criticism of a Tradesman's Advertisement or Handbill.

A tradesman's advertisement or handbill is open to fair criticism and remark, like a book or a work of art. *Paris* v. *Levy*, 342

LICENSED VICTUALLER.

Sale of Wine, &c., on Sunday.—*See* SUNDAY.

LIGHTS.

Obstruction of.

In an action for obstructing ancient lights, the facts stated in a special case were as follows:—The plaintiffs and defendants possessed premises opposite to each other in the city of London; the plaintiffs' premises, in which were windows which had been used for more than twenty years, having been burnt down, the plaintiffs rebuilt them, but, in the newly erected building, the windows were placed in different situations, were of different sizes, and altogether occupied more space than those in the old building; some parts of the new windows coincided with some parts of the old ones, but a great portion of the old and new windows did not coincide.

In the special case it was stated that "the defendants could not have obstructed the passage of light to such portions of the windows of the plaintiffs' new building as were new, without at the same time obstructing the passage of light to such portions of the plaintiffs' new windows as were in the sites of the old windows, to the extent stated in the declaration:"—

Held, by the Exchequer Chamber,—affirming the judgment of the court below,—that, as none of the new windows occupied the same position as any one of the ancient windows did, no right was acquired in respect of any of them against the plaintiffs. *Hutchinson* v. *Copestake*, 863

LIVERPOOL DOCKS.

Rateability of the Trustees in respect of.

The trustees of the Birkenhead Docks were empowered by various acts of parliament to take lands by purchase, &c., to construct works, to resell or lease land not wanted, to impose (within certain limits) such rates for vessels using their docks as they might think proper, and to vary those rates, and to lease their wharfs, quays, &c. They were also empowered to borrow money on the security of the rates. *All* sums received from rates or the sale or rents of land were to be laid out by them in defraying the costs of the works, paying officers and servants, carrying the acts into execution, and paying the interest and principal of moneys borrowed. The Court of Queen's Bench held, in the case of The Trustees of the Birkenhead Docks v. The Overseers of Birkenhead, 2 Ellis & B. 148, that the trustees were rateable to the poor in respect of their premises.

The Mersey Docks and Harbour Board, under a series of acts containing very similar provisions, were held by the Court of Common Pleas in The Mersey Docks and Harbour Board v. Jones, 8 C. B. N. S. 114,—in deference to a previous decision of the Court of Queen's Bench, upon a case stated by the sessions (The King v. The Inhabitants of Liverpool, 7 B. & C. 61, 9 D. & R. 780),—not to be rateable in respect of their premises.

By the Birkenhead Docks Act, 1855, 18 & 19 Vict. c. clxxi., all the works, &c., and all the estate, &c., of the Birkenhead Docks were transferred to and vested in the corporation of Liverpool, *subject to the liabilities created by act of parliament*. And by a subsequent act, 20 & 21 Vict. c. clxii., the Liverpool Docks estate, and all property held by or in trust for the trustees of the Liverpool Docks under the acts before mentioned, were vested in the Mersey Docks and Harbour Board, "but subject to all charges and liabilities affecting the same:"—

Held, by the majority of the court, that, whether or not the Mersey Docks and Harbour Board were exempted from liability to be rated to the poor in respect of their occupation of the Birkenhead Docks, by reason of their occupation not being a beneficial one, the exemption furnished only a ground of appeal to the quarter sessions against the rate, and not ground for an action in respect of a levy made to enforce the rate,—Willes, J., intimating a doubt (though disclaiming any intention to give a final opinion upon the point) "whether the statutory avowry could be proved, where there was an absolute exemption from the rate." *The Mersey Docks Trustees* v. *Cameron*, 812

LLOYD'S.

Custom of,—See INSURANCE.

LOG BOOK.

See PRACTICE, 4.

LORD'S DAY.

See SUNDAY.

LUNATIC.

Obtaining Money out of Court.

An action having been brought by the wife of a lunatic (not so declared by commission) in his name, for the recovery of a debt, the defendant paid the money into court:—The court made absolute a rule for payment of the money out to the wife. *Gleddon* v. *Trebble*, 367

MAGISTRATES.

Stating case under 20 & 21 Vict. c. 43.

The court will not, at the instance of the justices, pronounce any opinion upon a case stated pursuant to the 20 & 21 Vict. c. 43, where the appellant and respondent decline to appear. *Walters*, app., *Williams*, resp., 179

MAINTENANCE.

What amounts to.

A contract whereby an attorney stipulates with a client to receive, in consideration of the large advances requisite to the conducting the proceedings to a successful issue, over and above his legal costs and charges, a sum which should be commensurate with his outlay and exertions, and with the benefit resulting to the client,—is void on the ground of maintenance. *Earle* v. *Hopwood*, 566

MALICIOUS PROSECUTION.

On unfounded Charge of Perjury.

M. sued F. in the county court for a debt. F. claimed a set-off, in answer to which M. produced his ledger containing an acknowledgment signed, as he swore, by F. F. denied the signature, which he averred to be

a forgery; but the judge, induced partly by the statement of M. and partly by the conduct of F. before him, disbelieving F.'s denial, committed him for trial for perjury, under the 14 & 15 Vict. c. 100, s. 19, and bound M. over to prosecute. F. was accordingly tried for perjury, and acquitted.

F. then brought an action against M. for maliciously and without probable cause causing him to be prosecuted on an unfounded charge:—

Held, by Cockburn, C. J., Bramwell, B., and Channell, B., on appeal,—reversing the judgment of the court below, and contrary to the opinions of Wightman, J., and Blackburn, J.,—that the action was maintainable; the committal of F., and his prosecution for perjury, being the result of the wrongful and malicious act of M. *Fitzjohn* v. *Mackinder*, 505

MASTER AND SERVANT.

Authority of Servant to warrant a Chattel.

The servant of a *private owner* intrusted to sell and deliver a horse on one particular occasion, is not *by law* authorised to bind his master by a warranty: the buyer therefore, taking such a warranty, takes it at the risk of being able to prove that the servant had *in fact* his master's authority for giving it. *Brady* v. *Todd*, 592

MEDWAY NAVIGATION.

Construction of Stat. 13 *G.* 2, *c.* 26.

1. By a public act of parliament (13 G. 2, c. 26), certain persons were incorporated, with the usual powers, for the purpose of making the river Medway and streams thereinto flowing navigable, and it was amongst other things enacted that "the said river or streams so to be made navigable, and all lands, tenements, and hereditaments to be by them (the company) made use of for the benefit of the said navigation by virtue of a former act and that act, should be and were thereby vested in the said company, their successors, heirs, and assigns forever."

The defendants erected works on the banks of the river for the purpose of raising, and thereby raised, water from the river for the supply of the county lunatic asylum and county gaol:—

Held, that the statute created in the company a property and interest in the water of the river which was interfered with by the abstraction of it for the purpose to which it was applied by the defendants,—purposes more extensive than those for which a riparian proprietor, as such, could insist upon appropriating the stream as it passed by his land; and that it was not necessary to the maintenance of the action that there should be actual damage to the navigation, inasmuch as the legislature intended to give the company such an interest in all the water of the river for the purposes of the navigation as was interfered with by the abstraction of any part thereof. *Medway Company* v. *Romney* (*Earl*), 575

2. Whether or not the riparian proprietors could exercise for the benefit of the land adjoining the river the rights which ordinarily belong to such proprietors,—*quære*? *Id.*

MERCANTILE LAW AMENDMENT ACT.

Construction of 19 & 20 *Vict. c.* 97, *s.* 5.

A., who was jointly liable with nine other persons, having been taken under a ca. sa., paid the entire debt:—Held, that he was entitled, by the 5th section of the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, to an assignment of the judgment; and that, in an action against the judgment-creditor to enforce such assignment, a plea that the judgment had been satisfied by payment by A. after he had been taken in execution under it, was no answer. *Batchellor* v. *Lawrence*, 543

MERCHANT SHIPPING ACT, 1854.

Construction of, s. 55,—*See* AGREEMENT, 4.

MERSEY DOCKS AND HARBOUR BOARD.

See LIVERPOOL DOCKS.

MISREPRESENTATION.

See EVIDENCE.

MUNICIPAL CORPORATION.

Retainer of Attorney by.

The mayor and assessors of the borough of R. having refused to revise the lists of burgesses of certain parishes within the borough, on the ground that they had not been published within the time prescribed by the Municipal Corporation Act, 5 & 6 W. 4, c. 76, s. 15; and having rejected certain notices of claim and objections, on the ground that they had not been *personally* delivered to the town clerk,—the parties thus disfranchised obtained writs of mandamus to compel the succeeding mayor and assessors to hold another court to revise the lists.

The corporation under their seal retained the plaintiff as their attorney to defend them against these proceedings, but the defence substantially failed:—

Held, that the plaintiff was entitled to maintain an action against the corporation for his costs incurred under the retainer; and that, inasmuch as there was nothing to show that the defence was unjustifiable or improper, the expense was chargeable on the borough fund. *Lewis* v. *Rochester* (*Mayor &c.*), 401

NAVIGABLE RIVER.

See MEDWAY NAVIGATION.

[NEGLIGENCE.

See TURNPIKE TRUSTEES.]

NOVEL.

Dramatising without the Author's consent,—See COPYRIGHT.

NUISANCE.

Permitting Premises to be Ruinous, &c.

An action lies against the owner of premises who lets them to a tenant in a ruinous and dangerous condition, and who causes or permits them so to remain until by reason of the want of reparation they fall upon and injure the house of an adjoining owner. *Todd* v. *Flight*, 377

PATENT.

See LETTERS PATENT.

PARTNERSHIP.

Test of Liability quoad Third Persons.

1. The proper test of liability as a partner is not whether the party sought to be charged has stipulated for a participation in profits as such, but whether the person by whom the trade was actually carried on carried it on in the capacity of agent for him. *Wheatcroft and Cox* v. *Hickman*, 47
2. A. and B., who carried on the business of iron-masters in copartnership, by a deed, purporting to be made between A. and B. of the first part, five persons named as trustees of the second part, and the several persons whose names were contained in a schedule as creditors for the sums therein mentioned, and who should execute the deed, of the third part,—reciting that the said A. and B. were indebted to the several persons parties thereto of the third part, and that they had agreed to assign all their estate and effects for the benefit of such creditors,—assigned the works and all their property and effects to the trustees, upon trust, amongst other things, *to carry on the business* under the name of "The Stanton Iron Company," and *out of the profits* to pay interest on mortgages, &c., and to "*pay and divide the net income of the business remaining after answering the purposes aforesaid, unto and among all and singular the creditors of A. and B., in rateable proportions, according to the amount of their respective debts*:—

Held, by the House of Lords, reversing the judgments of the courts below, that, under this deed, the *creditors* executing it did not become liable *as partners* for debts contracted by the trustees in carrying on the trade. *Id.*

PERJURY.

See MALICIOUS PROSECUTION.

PLEADING.

Transfer of Liability for a Debt to a Third Person.

1. In an action to recover 500*l.* under an agreement, the defendant pleaded, as to 339*l.*, that, before the commencement of the suit, the plaintiff was indebted to one S. S. in the sum of 339*l.*; that the defendant, at the request of the plaintiff, agreed with S. S. to pay him the 339*l.*, and S. S. agreed to accept the defendant as his debtor instead of the plaintiff for that sum; and that the defendant was still liable to pay the same to S. S.:—Held, no answer to the plaintiff's claim, inasmuch as the plea did not show that the plaintiff's liability to S. S. was discharged. *Cochrane* v. *Green*, 448

Equitable Plea.

2. To a count on a contract under which the defendants, a gas company, were to pay the plaintiff a certain sum for erecting buildings, &c., and laying down pipes and mains for the company, the defendants pleaded "for defence on equitable grounds," that, before and at the time of making the agreement, the company was registered pursuant to the 7 & 8 Vict. c. 110; that the agreement was made and entered into before the passing of the Joint Stock Company's Act, 1856, and whilst the first-mentioned act remained in full force; that the plaintiff before and at the time of making the contract was a director of the company; that, whilst such director, he was concerned and interested in the contract; and that, whilst such director and so interested and concerned, he voted and acted as a director on the subject of the contract, contrary to the first-mentioned act:—Held, that the plea was a good answer. *Steare* v. *South Essex Gas-Light and Coke Company*, 180
3. The defendants further pleaded "for defence on equitable grounds," that the company were induced to and did enter into the contract on the terms and conditions that the plaintiff would guaranty and secure to the shareholders of the company a clear net annual dividend at the rate of 6*l.* per cent. per annum on the amount of paid up capital, and on the faith of the plaintiff's giving such guarantee or security; but that the plaintiff had never given or entered into such security, nor had such dividend ever been paid, although all things were done and performed on the part of the company and the shareholders thereof which were necessary to entitle them to have such guarantee or security given and entered into and such dividend paid as aforesaid, and the respective times for the giving and entering into such security, and for the payment of a great part of the dividend, elapsed before suit:—Held, no answer to the action,—the failure

to perform the contract alleged in the plea being only ground for a cross-action. *Stears* v. *South Essex Gas-Light and Coke Company*, 180

Equitable Replication.

4. To a plea of accord and satisfaction by the delivery by the defendants to the plaintiff, and acceptance by him, of divers moneys, and executing and delivering to him divers deeds and securities for money, and allotting him divers shares in the company,—an equitable replication (as to the deeds and securities), that such deeds and securities were delivered to and accepted by the plaintiff on the faith of a representation by the defendants that they were valid and binding securities, whereas they were not valid and binding on the company, and were before suit repudiated by them, was held good. *Id.*

Equitable Set-off.

5. Where A. has a money demand against B., and B. (*through a trustee*) has a money demand against A. which but for the intervention of the trust would have constituted a good legal set-off against A.'s demand, the latter may be pleaded by way of *equitable* set-off. *Cochrane* v. *Green*, 448

And see BIRMINGHAM CANAL ACT.

POOR-RATE.

Rateability of the Birkenhead Docks,—See LIVERPOOL DOCKS.

PRACTICE.

Service of Process.

1. *On British subject abroad.*]—The defendant, a British subject, was served personally in California with a writ of summons issued under the 18th section of the Common Law Procedure Act, 1852, requiring him to appear thereto within fifty days. Upon an affidavit of the debt being due, and that the defendant's property in England was being disposed of, the court made an order that the plaintiff be at liberty to proceed in eight days, without giving the defendant any notice of declaration. *Bates* v. *Bates*, 561

2. The court refused to stay the proceedings, upon an appearance entered by the general attorney of the defendant after the expiration of the eight days. *Bates* v. *Bates*, 564

Inspection of Documents.

3. The court will not grant a rule for the inspection of documents which were produced in evidence at the trial, for the mere purpose of furnishing materials to the other side for moving for a new trial. *Pratt* v. *Goswell*, 706

4. In an action by a consignee of goods against shipowners for damage sustained in consequence of the unseaworthiness of the ship, the court made an order, under the 50th section of the Common Law Procedure Act, 1854, for the plaintiff to inspect and take copies of certain surveys made on the ship in a foreign port, a general average statement, the shipwright's bill for the repairs done to the ship, the captain's protest, and the log-book,—as being documents proximately connected with the matter in issue. *Daniel* v. *Bond*, 716

5. *Semble*, that, since the statute, there is no difference in this respect between the case of an action between the owners and underwriters and any other persons. *Id.*

Taking Money out of Court.

6. An action having been brought by the wife of a lunatic (not so declared by commission) in his name, for the recovery of a debt, the defendant paid the money into court:—The court made absolute a rule for payment of the money out to the wife. *Gleddon* v. *Trebble*, 367

[PRINCIPAL AND AGENT.

(1). *Waiver of Condition by Agent.*

By the deed securing an annuity which A. had granted to B., who resided abroad, power was given to A. to redeem the annuity upon paying a certain sum of money, and giving B. six months' notice in writing. C., who was B.'s general agent in this country, received the redemption-money from A., and delivered up to him the annuity deed without the notice required by the deed, and B., in fact, had no notice whatever that the money was about to be paid. C. had a general authority to invest and also to receive principal moneys as well as interest for B.:—Held, that C. had, therefore, authority to waive the stipulation as to notice, and to receive the redemption-money as he did for B. *Webber and Another* v. *Granville*, 883

(2). *Letters of Deceased Agent, when admissible on the Subject of Agency,—See* EVIDENCE, III.]

PRIVATE ROAD.

See ENCLOSURE.

PROCESS.

See PRACTICE, 1.

PROMISSORY NOTE.

See BILL OF EXCHANGE, 1.

PROTEST.

See PRACTICE, 4, 5.

PROVISIONAL ORDER.

See ENCLOSURE.

QUAKER.

See CHURCH-RATE, 2.

RAILWAY.

Placing Rubbish on a Railway.

1. Upon an information before justices on behalf of a railway company, for an offence against their act of incorporation, in placing stones and rubbish on the railway, and thereby obstructing the free passage of the same, the evidence was that the act was done by certain persons employed by the defendant to repair a wall between the railway and his premises adjoining, and that on one occasion the defendant himself, who was standing by, nodded his head and directed the workmen to go on:—Held, on appeal under the 20 & 21 Vict. c. 43, s. 2, that there was evidence to warrant the justices in convicting the defendant. *Roberts*, app., *Preston*, resp., 208

2. Held, also, that the person lodging the complaint on behalf of the company was properly made the respondent in the appeal. *Id.*

RAILWAY COMPANY.

(1). *Award under the Lands Clauses Consolidation Act*, 1845.

1. A railway company were empowered by their act of parliament to abandon certain tramways which communicated with certain iron-works of A.; and, they having given A. notice under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), of their intention to take certain of his lands, the amount of compensation was referred to an umpire, who was to ascertain and direct what should be paid "for the interest in the lands, and for any damage that might be sustained by reason of the execution of the works."

A. made a claim before the arbitrator for compensation in respect of damage which he alleged he would sustain if the tramways were stopped up: and the umpire awarded that a certain sum should be paid by the company to A. "as and for purchase and compensation for and in respect of his interest in the said lands and hereditaments, and for damage sustained and which may be sustained by him by reason of the execution of the works of the said railway, or the exercise by the said company of the powers of the said act:"—

Held, that it did not appear upon the face of the award that the umpire had exceeded his jurisdiction by awarding compensation in respect of a claim for damage not within the reference. *In re Brogden and The Llynvi Valley Railway Company*, 229

2. *Quære*, whether the award would have been bad if it had appeared that the arbitrator had given compensation for contingent damage which might arise from the exercise of the powers of the act? *Id.*

[(2). *Duty to carry between Way Stations.*

The fact of a list of tolls being stuck up at all the stations, according to the Act, is not evidence that they are bound as common carriers to carry goods in bulk from every such station. *Oxlade* v. *The North Eastern Railway Company*, 896]

RE-DELIVERY.

See DEED.

RIPARIAN PROPRIETOR.

See MEDWAY NAVIGATION.

RIVER.

See MEDWAY NAVIGATION.
THAMES CONSERVANCY.

ROAD.

See ENCLOSURE.

SERVANT.

Authority of,—See MASTER AND SERVANT.

SET-OFF.

See PLEADING, 5.

SHIPPING.

(1). *Master's Duty under Charter-Party.*

By a charter-party, the captain of an Austrian vessel engaged to go to Havana and there load a cargo from the factors of the charterers, and proceed therewith to Falmouth for orders as to his port of ultimate destination, which by a memorandum subsequently endorsed upon the charter-party included Copenhagen. On his arrival at Falmouth on the 18th of June, the captain gave the charterers notice, and was by them ordered (by telegram of the 28th) to proceed to Copenhagen. At this time war had broken out between France and Austria, and there being several French cruisers in the offing, the captain sent a telegram and also a letter apprising the charterers of his danger, and intimating that he awaited their "further decision." On the following day, the charterers sent their clerk down to Falmouth with a letter to the defendant directing him to follow the clerk's instructions. The clerk accordingly told the captain that he would direct him to go to Plymouth, but it would be under protest. The captain, however, declined to go without a "clean order:" and ultimately (on the 1st of July), the clerk gave him a written order to proceed to Plymouth, and there deliver the cargo; which was done:—

Held, that, upon these facts, the jury were warranted in finding that the defendant had not been guilty of a breach of contract in refusing to go to Copenhagen; and that it was no misdirection for the judge to ask

the jury if they thought the captain was under the circumstances justified in pausing until he received further definite orders from the charterers. *Pole* v. *Cetcovich*, 430

(2). *Transfer of Ship or Shares therein,—See* AGREEMENT, 3, 4.

[(3). *Construction of Letter, on changing Charter.*

The defendants having chartered a vessel to proceed to Taganrog, and there load a cargo at 60*s.* per ton, wrote the following letter to the plaintiffs:—"Enclosed please find three copies of charter, per William and Mary, from the Azof, and we shall feel obliged by your sending instructions to your firm at Taganrog to recharter for us, upon the best terms obtainable, and we hope you may be able to place her at advantage; but if, unfortunately, there should be any loss, your draft upon us for the difference will meet with due honour." At the time the vessel arrived at Taganrog, the rate of freight was 40*s.* per ton, and as the plaintiffs could not get more, they put their own cargo on board at that rate, drawing upon the defendants for the difference between that and 60*s.*, at which rate they would have to pay the owner in England when the vessel arrived. The vessel was eventually lost, and the defendants refused to accept the plaintiffs' bill, on the ground that, inasmuch as the ship never arrived at her destination, the plaintiffs were not liable for the freight, and as they had chartered her to themselves, and not to a third person, they had not paid away any money, and therefore they had sustained no such loss as was contemplated in the letter:

Held, that, as the moment the cargo was put on board there was a difference in the insurable value, as it then became liable to a freight of 60*s.* instead of 40*s.*, there was such a loss sustained as was in contemplation at the time of the contract. *Yeames* v. *Lindsay*, 884]

SLANDER.

(1). *Costs where less than 40s. Damages recovered.*

The 21 Jac. 1, c. 16, s. 6,—which provides, that, in actions for slanderous words, if the plaintiff recovers less than 40*s.* damages, he shall only recover the same amount of costs,—is not repealed by the 3 & 4 Vict. c. 24. *Evans* v. *Rees*, 391

[(2). *Presumption of Malice.*

At the trial of an action for slander, the plaintiff's witnesses proved that the slanderous statements were untrue in fact, but also that they were the natural and reasonable inferences from what took place and they professed to describe; and that the defendant was present at the occurrence which the slanderous statements referred to. The judge ruled that the occasion was privileged; but that the plaintiff must have a verdict unless the defendant proved that the statements were made without malice:

Held, a right direction; the presence of the defendant being some evidence that the statements were made with a knowledge that they were untrue. *Hartwell* v. *Vesey*, 882]

SPECIFICATION.

See LETTERS PATENT.

STAMP.

On Articles of Clerkship,—See ATTORNEY, 1.

STANTON IRON COMPANY.

See PARTNERSHIP.

STATUTE OF FRAUDS.

Note or Memorandum of the Bargain within the 29 Car. 2, c. 3, s. 17.

A. upon one and the same occasion bought several parcels of goods of B., one parcel (consisting of chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*) for ready money, the rest (some of which had to be manufactured) on credit. The goods were sent to A. at different times. The chimney-glasses being damaged in the carriage, A. declined to receive them. A. afterwards, in answer to an application by B. for payment for the whole of the goods, wrote to him in substance as follows:—"The only parcel of goods selected for ready money was the chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*, *which goods I have never received, and have long since declined to have, for reasons made known to you at the time:* with regard to the rest, I am ready to pay," &c.

An action having been brought to recover the value of the whole of the goods, A. paid into court sufficient to cover all but the price of the chimney-glasses, and the jury found that the chimney-glasses were sold under a separate contract from the rest of the goods:—Held, that the letter,—inasmuch as it contained an admission of the bargain and of all the substantial terms of it,—was a sufficient note or memorandum of the contract to satisfy the 17th section of the Statute of Frauds, notwithstanding the subsequent attempted repudiation of liability. *Bailey* v. *Sweeting*, 843

SUNDAY.

Sale of Wine, &c., during the Hours of Divine Service.

1. The 11 & 12 Vict. c. 49 is not repealed by the subsequent statutes, 17 & 18 Vict. c. 79, or 18 & 19 Vict. c. 118,—as supposed in the case of Regina v. Whiteley, 3 Hurlst. & N. 143†; but still regulates the closing of houses for the sale of wine, spirits, beer, or other fermented or distilled liquors, during

the *morning* service,—the statute 18 & 19 Vict c. 118, applying only to the *afternoon* service. *Harris*, app., *Jenne*, resp., 152

2. Upon an information before justices under the first-mentioned statute, for the sale of "British wine" within the prohibited hours, it was proved by a practical chemist that the liquor sold contained a large proportion of alcohol, and the justices found that it was "wine," within the meaning of the statute:—Held, that their conclusion was warranted by the evidence. *Id.*

SURVEY.

See PRACTICE, 4.

THAMES CONSERVANCY.

Construction of Statutes.

The corporation of London were empowered by various acts of parliament passed at a time when they claimed a right to the soil and bed of the river Thames, and exercised the power of conservancy thereof from Staines Bridge to Yantlett Creek, to borrow money to be expended in the improvement of the navigation of the river westward of London Bridge, and to levy tolls and duties upon boats and other vessels navigating the river between Staines and the bridge, and to charge the moneys borrowed under the acts upon such tolls, by way of life-annuity or bond.

The corporation accordingly raised large sums on bonds conditioned for the payment of certain yearly sums "out of the tolls and duties granted and made payable by virtue of the said acts," until payment of the principal; and such yearly sums were duly paid by them down to the passing of the Thames Conservancy Act, 20 & 21 Vict. c. cxlvii.

By that act,—which professed to be passed, amongst other things, for the purpose of carrying out an agreement between the Crown and the corporation for the settlement of conflicting claims between them in respect to the right to the soil and bed of the Thames,—the conservancy of the river is taken away from the corporation and vested in a newly created body of twelve conservators (of whom seven were members of the corporation of London), in whom all the right and interest of the Crown and of the corporation in the bed and soil of the river were vested, as well as the power to receive and apply the tolls above mentioned and all other tolls, dues, &c.

There was no express provision in the last-mentioned act either for discharging the corporation from liability on these securities, or imposing any liability upon the newly created body in respect of them:—

Held,—dissentiente Willes, J.,—that, the performance of the obligation by the corporation having been rendered impossible by act of the law, the obligation was discharged, and no action would lie against the corporation thereon. *Brown* v. *London* (*Mayor, &c.*), 726

TIME TABLES.

See EVIDENCE.

TRESPASS.

In Pursuit of Game,—See GAME.

[TURNPIKE TRUSTEES.

Liability for Negligent Construction of Road.

1. The defendants were the trustees of a turnpike road, and the plaintiff alleged that they so negligently made and maintained certain catchpits for carrying off the water from the road, that large quantities of water ran into his land and collieries, whereby he was greatly damaged. The plaintiff first complained in July, 1859, and the defendants made some alterations; he was again damaged, and complained in December of the same year, and eventually brought this action. On behalf of the defendants it was contended that the action was not brought in time, inasmuch as it was not brought within three months after the act complained of was committed, as enacted by sect. 147 of the Turnpike Road Act, 3 Geo. 4, c. 126:

Held, that the action was in time, as no cause of action arose to the plaintiff so long as the works of the defendants caused him no damage, and that the cause of action first accrued when the plaintiff received actual damage. *Whitehouse* v. *Fellowes*, 901

2. It was also contended that, according to the case of Sutton v. Clarke, the defendants being trustees were not liable, and that the learned judge did not leave the question properly to the jury to say whether the defendants had been guilty of negligence:

Held, that the learned judge was right in asking the jury whether they considered the defendants had been guilty of negligence, and that they having found in the affirmative, that then the defendants were liable for such negligence. *Id.*]

See GAME.

UNDERWRITERS.

See INSURANCE.
PRACTICE 4, 5.

USE AND OCCUPATION.

See LANDLORD AND TENANT.

USUAL TERMS.

See ARBITRAMENT, 1.

VESTRY MEETING.

Notice of.

See CHURCH-RATE, 1.

VICTUALLER.

Sale of Wine, &c., on Sunday.

See SUNDAY.

VIEW.

See ARBITRAMENT, 7.

WARRANTY.

On Sale of a Horse.

The servant of a *private owner* intrusted to sell and deliver a horse on one particular occasion, is not *by law* authorised to bind his master by a warranty: the buyer therefore, taking a warranty, takes it at the risk of being able to prove that the servant had *in fact* his master's authority for giving it. *Brady* v. *Todd*, 592

WINDOWS.

See ANCIENT LIGHTS.

WITNESS.

Special Contract to attend and give Evidence,—Yeatman v. *Dempsey*, 881

WRIT OF SUMMONS.

Service on a British Subject abroad,—See PRACTICE, 1.

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